UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DAYCON PRODUCTS COMPANY, INC.

and

Case Nos. 05-CA-035687
05-CA-035738
05-CA-035965
05-CA-035994

DRIVERS, CHAUFFEURS AND HELPERS
LOCAL UNION NO. 639 a/w
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Daniel M. Heltzer, Esq., and Jason N. Usher, Esq.
for the General Counsel.
Paul Rosenberg, Esq., of New York, New York, and
Erica Berencsi, Esq., of Washington, D.C.
for the Respondent.
John R. Mooney, Esq., and Lauren Powell, Esq.,
of Washington, D.C. for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

Eric M. Fine, Administrative Law Judge. This supplemental proceeding was tried before me in Washington, D.C. on September 30, December 11, 12, and 13, 2013; and January 7, 8, and 9, 2014, pursuant to a compliance specification and notice of hearing issued on June 28, 2013. The compliance specification, as amended, alleges the amount of $1,161,367.53 in backpay and benefits, plus interest, due under the terms of the Board's decision and order dated September 21, 2011 at 357 NLRB No. 92, which was enforced by the U.S. Court of Appeals for the D.C. Circuit on November 6, 2012, at 494 Fed. App'x 97, without the need for

oral argument; and rehearing en banc denied January 14, 2013.[1]

A. Background and global issues[2]

1. The granting of the General Counsel's motion *in limine*

This case involved the aftermath of a strike that began on April 26, 2010, emanating from the Respondent's unlawful declaration of impasse and imposition of new terms and conditions of employment on that date. The judge, in the underlying unfair labor practice proceeding, found that on July 2, 2010, the Union made an unconditional offer to return to work for the unfair labor practice strikers to report on July 6, 2010. The Board in enforcing the judge's decision ordered at 357 NLRB No. 92, slip op. at 2 that Respondent:

> (b) Make all striking employees whole for any loss of earnings and other benefits suffered as a result of the refusal to reinstate them on July 6, 2010, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

The Board went on to state at footnote 2, that "we modify the judge's remedy to provide that the unfair labor practice strikers shall be made whole for their losses, if any, from July 6, 2010, to the date they receive valid offers of reinstatement in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 36 NLRB No. 8 (2010).'

The Board's order also provided that Respondent:

> (e) On request by the Union, rescind any or all of the changes in terms and conditions of employment for its unit employees that were unilaterally implemented on April 2010, when the company implemented its last bargaining offer.

Included in what was implemented as part of Respondent's final offer were scheduled wage increases to be given bargaining unit employees.

In its decision at 357 NLRB No. 92, slip op. at 1 fn. 1, the Board denied Respondent's motion to reopen the record stating: "The Respondent failed to furnish an adequate explanation

[1] Respondent filed a petition for certiorari of the D.C. Circuit's decision on June 13, 2013, based on the decision in *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013). The Charging Party asserts in its brief that, prior to filing its request for certiorari, Respondent first requested the D.C. Circuit to rescind its mandate here based on *Noel Canning,* however, that request was denied. Respondent asserts in its brief that its request for review to the Supreme Court is based on the argument that the Board's decision and order in the underlying unfair labor practice case was invalid because the Board lacked a proper quorum upon issuing the same. Respondent states the Supreme Court has held its petition in abeyance pending its decision in the *Noel Canning* case. There was no request to me to delay this proceeding pending the outcome of the Supreme Court litigation. Moreover, the backpay period began in July 2010 and ended in 2012. Noting the likelihood of fading memories, and that the substantive issues had already been before the Board and the D.C. Circuit, had such a request been made, it would have been denied.

[2] Each party filed a post-hearing brief, which I have considered. The General Counsel's unopposed motion to correct the transcripts and exhibits attached to their brief is granted.

why the evidence it proffers was not submitted at the hearing or why the evidence would require a different result." The D.C. Circuit in enforcing the Board's order stated, "We hold that the Board's findings are supported by substantial evidence in the record. Daycon also raises procedural challenges to the Board's denial of certain motions. As to these, we hold that the Board did not abuse its discretion." See, 494 Fed. App'x 97.

In Respondent's July 19, 2013, answer to the compliance specification, Respondent challenged the backpay period alleged in the compliance specification for the individual strikers stating, "the following statements and correspondence from officers of the Charging Party (the "Union") during the strike raise significant questions regarding the duration of the Union's purported unconditional offer to return to work." Respondent cited July 23, 2010, correspondence from the union president to counsel for Respondent, wherein Respondent asserts the union president demanded that Respondent restore terms and conditions prior to the declaration of impasse. Respondent also asserts that on October 1, 2010, the union president wrote another letter to Respondent's counsel where it was explained that the July 23, 2010, letter was a request to rescind the implemented terms and reinstate the strikers. It is also asserted in the answer that on February 10, 2013,[3] that the Union's business agent repeatedly testified at an evidentiary hearing in support of the Board's petition for interim relief that the Union viewed rescission and reinstatement as inextricably tied together. Respondent cited, in its answer, Exh. B to Respondent's motion to reopen record to the Board in the underlying case as the source of this testimony. Respondent argues in its answer here that an unconditional offer is not unconditional when contingent upon the restoration of terms that existed under an expired agreement. Respondent argues in its answer that the cited documents "sheds significant doubt on the duration of the Union's purported unconditional offer to return to work."

On September 11, 2013, counsel for the General Counsel filed a motion *in limine* "seeking to preclude any and all evidence or argument by Respondent regarding the Union's unconditional offer to return to work because this issue has already been fully litigated by Respondent." Respondent filed a response brief, along with attachments on September 25, 2013. Respondent argued the judge's February 15, 2011, decision does not contemplate in any respect issues regarding the tolling of the backpay period. While Respondent in its answer to the compliance specification asserts that Union Business Agent Webber provided testimony at a 10(j) proceeding on February 13, 2013, in its response to the General Counsel's motion *in limine* Respondent asserts that the 10(j) proceeding took place in February 2011, and that Respondent subsequently filed a motion to reopen the record with the Board so that the new evidence from the 10(j) proceeding would be considered. Respondent asserts in its response brief to the motion *in limine* that Respondent argued in its motion to reopen the record that the evidence from the 10(j) proceeding was incompatible with the Board and judge's decision that the Union remitted an unconditional offer to return to work. Respondent states the Board denied the motion to reopen the record and the evidence was never considered.

Respondent now contends in its answer to the motion *in limine* that the backpay period began on July 2, 2010, when the Union submitted an unconditional offer to return to work, and that Respondent "has no intention of using compliance to resuscitate whether the July 2nd offer was conditional. Instead, Daycon intends to introduce evidence that the backpay period must be tolled as a result of the unconditional offer converting into a conditional offer at a distinct point in time. The ALJ never broached the latter issue."

[3] I find the referenced 10(j) proceeding actually took place in 2011, and that any testimony pertaining to it was given in that year. I find Respondent's reference to 2013 was a typo and should read 2011.

However, in Respondent's March 11, 2011, motion to reopen the record to the Board, which was attached as an exhibit to Respondent's answering brief to the General Counsel's motion *in limine*, Respondent citing the very same 10(j) transcripts that it attempted to put forth in this compliance proceeding argued that Webber's testimony there "viewed in the context with Webber's repeated admissions that in July the Union viewed (and still does view) rescission and reinstatement to be inextricably tied together reveals that the offer to return to work was anything but unconditional." Respondent then argued that the admission of the 10(j) transcript would warrant a finding "that the Union's offer to return to work was not unconditional."

At the compliance proceeding, I granted counsel for the General Counsel's motion *in limine.* In this regard, the judge in the underlying unfair labor practice proceeding fully litigated and found the Union's offer to return to work was an unconditional offer. In fact the judge's factual findings reveal Respondent treated it as such at the time it was made and thereafter, although it reinstated the strikers as economic rather unfair labor practice strikers in contravention of the judge's and Board's orders bringing about this compliance proceeding. In fact, the judge stated in the remedy section of his decision at 357 NLRB No. 92, Jd., slip op at 13 that:

> Having found that the Respondent has refused to offer reinstatement to some of the unfair labor practice strikers after receiving the Union's unconditional offer to return to work, I recommend that Respondent be order to offer reinstatement to all unfair labor practice strikers who have not already been offered reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, and to make all the unfair labor practice strikers whole for the losses that they suffered, if any, from July 6, 2010 to the date of reinstatement,…

Similarly, the Board stated at 357 NLRB No. 92, fn 2 that, "the unfair labor practice strikers shall be made whole for their losses, if any from July 6, 2010, to the date they receive valid offers of reinstatement…"

Thus, contrary to Respondent's position before me, I find that the duration of the backpay period as it relates to the Union's unconditional offer to return to work was fully litigated at the underlying unfair labor practice proceeding. Therefore, I rejected at the hearing, Respondent's attempt to reargue it again at the compliance proceeding. See, *Diversified Enterprises, Inc.,* 358 NLRB No. 48 (2012), slip op. 2 holding that:

> as the matter was fully litigated and resolved in the underlying proceeding, the Respondent is barred from raising it again in the compliance stage of this proceeding. See, e.g., *Transport Service Co.*, 314 NLRB 458, 459 (1994); *Laborers Local 135 (Bechtel Corp.)*, 311 NLRB 617, 621 (1993), enfd. 148 LRRM 2640 (3d Cir. 1995); *Baumgardner Co.*, 298 NLRB 26, 27-28 (1990), enfd. mem. 972 F.2d 1332 (3d Cir. 1992).

Here, Respondent is attempting to reintroduce the same correspondence and 10(j) transcript that was either available to Respondent prior to the close of the underlying unfair labor practice proceeding, or as to the 10(j) transcript rejected by the Board, as affirmed by the court on appeal in Respondent's failed attempt to reopen the record. In its motion to the Board to reopen the record, Respondent attempted to argue the evidence somehow compromised the Union's unconditional offer for the employees to return to work. Having failed in that argument, Respondent now attempts to take a different tack relying upon the same evidence. Respondent

now argues that the Union made an unconditional offer to return to work in July 2010, but this evidence shows that the offer was compromised at a later date, therefore somehow tolling the strikers' backpay. First, Respondent neglected to make this argument based on the same evidence to the Board and the court when it attempted to reopen the record. Second, I find it to be nothing more than an attempt to recast its initial argument, but weakened by the fact that the initial argument failed. Third, I find the judge and the Board, as enforced by the court, specifically found the duration of the backpay period as it relates to the unconditional offer to return to work as set forth above, and that Respondent's effort here is an attempt to re-litigate that finding and therefore I adhere to my decision at the hearing granting the General Counsel's motion *in limine.*

2. The discriminatees are entitled to receive wage increases Respondent implemented during the backpay period as part of their backpay

Respondent argues in its answer to the compliance specification that wage increases described in paragraph 3(f) of the specification should not be included in the backpay calculations. It is argued that the Board's Order provided that the wage increases Daycon implemented be rescinded upon request. It is contended that a wage increase was the only term Respondent implemented upon declaring impasse. It is asserted that the Union repeatedly demanded that Respondent rescind the implemented wage increase. It is asserted including the implemented wage increase into the backpay calculations ignores the Union's rescission request and violates the spirit of the Board's order. Respondent cites letters from Union officials dated July 23 and October 1, 2010, to Respondent's counsel Jay Krupin as the Union's demands in support of Respondent's theory. These letters, sent prior to the judge's or Board's order in the underlying unfair labor practice case, state that the Union demands that Respondent rescind the unilateral changes it made on April 23, 2010, and restore the terms and conditions in effect prior to Respondent's unlawful declaration of impasse. These letters were part of an effort by the Union then to renew bargaining with Respondent on terms that existed prior to its unfair labor practices.

In effect, Respondent, by this argument, is making a continued effort to rely on the Union's protests of its unfair labor practices, which at the time were made to restore bargaining, to now give Respondent a basis to retaliate against the strikers. Respondent's actions here are a clear attempt to contravene the Board's Order which issued on September 21, 2011, subsequent to the cited Union protests. The Board's Order provides:

> (e) On request by the Union, rescind any or all of the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on April 23, 2010, when the company implemented its last offer.

Board orders are framed this way to allow the Union the option as to whether or not to request the rescission of unilateral changes, some of which may be beneficial to unit employees. In this regard, giving the Union the option to leave certain benefits in tact allows it to elect to prevent the removal of those unilateral changes from further undermining the Union in the eyes of the employees. Respondent cannot help but be aware of this, yet it continues to make these arguments relying on the Union's pre-Board Order efforts to restore bargaining, as part of a continued effort by Respondent to eviscerate the Board's Order.[4] Respondent's counsel

[4] Respondent's counsel clarified at the hearing that this dispute is over annual raises of either $.40 or $.60 an hour depending on the employee's seniority.

admitted there has been no request by the Union to rescind the raises since the Board Order issued.

Moreover, Respondent goes even further here. Respondent's counsel stated at the hearing that the disputed raises were given by Respondent to employees who chose to work during the strike, and although it contends the Union requested the raises be rescinded, Respondent admits it never rescinded the raises for the bargaining unit as a whole. Rather, Respondent stated, at the hearing, that while it did not honor the Union's purported request to rescind the raises for all bargaining unit employees, that is those who did not go on strike, that it was within the province of Respondent to rescind the raises for those who did go on strike because in Respondent's view they chose not to take by raise because they went on strike instead of working. Respondent's counsel stated, "Whether we decide to pay the raises, subsequently, was up to us." This is kind of a unique interpretation by an employer that was found to have violated the Act by making unilateral changes to construe the Board's Order as allowing it to make more unilateral changes. Moreover, it is Respondent's self-serving interpretation that employees went on strike because they were receiving a raise. Rather, it is more likely that the employees determined to go on strike because Respondent had bypassed their collective-bargaining representative and implemented its final offer.

The Union's purported rescission of the wage increase requests were made during bargaining in generic letters requesting that Respondent rescind its unilateral changes. These requests were made for the bargaining unit as a whole, not just for the strikers. They were made prior to the Board Order giving the Union options in terms of the remedies it sought for Respondent's unfair labor practices. Respondent's selectively attempting to construe these requests as a means of denying strikers their raises while granting those same raises to non-strikers reveals that Respondent is attempting to discriminate against employees for engaging in the union activity of striking. Moreover, Respondent knows better, for it stated in its counsel's January 22, 2013, position statement to the Region as follows:

> Rescission of Changes: The only change implemented` was a wage increase. To our knowledge, the Union has not requested that this change be rescinded.

In fact, Respondent's counsel admitted, at the hearing, that it gave the returning strikers the disputed wage increases when they were recalled to work. So, the Respondent, despite admitting that the Union demanded the wage increases be rescinded for the bargaining unit as a whole during bargaining, gave those same wage increases to the bargaining unit employees who worked during the strike, and gave those wage increases to the strikers when they were recalled to work. Respondent contends that the only category of employees who should be denied the wage increases are the strikers who it unlawfully failed to recall on July 6, 2010, for the duration of their backpay period. As set forth above, the Respondent admits the Union never requested that Respondent rescind the wage increases following the Board's Order, and I find Respondent's argument lacks merit and further that it is an attempt to retaliate against the strikers for engaging in the strike. Accordingly, I find that the strikers were entitled to the wage increases, as found in the compliance specification, as amended, for the duration of their backpay periods, as well as upon their reinstatement.[5]

[5] At the outset of the hearing, the General Counsel introduced into evidence G.C. Exh. 3, which contained the General Counsel's final position with respect to the amounts of backpay owed to each of the discriminatees covered by the compliance specification. When I make reference to the amounts owed to the discriminatees as set forth by the amended compliance specification, I am making reference to the amounts set forth in G.C. Exh. 3.

3. The calculation of medical benefit claims

Respondent disputes, in its answer to the compliance specification, and in its brief, the Region's analysis concerning medical benefits for strikers during the backpay period. Respondent argues in its answer that the backpay amounts in the compliance specification fail to deduct employee contributions toward health insurance that the applicable collective-bargaining agreement would have required been deducted from the strikers' paychecks had they continued working for Respondent in lieu of striking. Respondent sets for forth the bi-weekly contribution amounts for employees who had single or family coverage immediately prior to going on strike, and asserts these amounts should be deducted from the strikers' backpay whether or not they made claims against Respondent for medical expenses during their backpay period. Respondent, in its brief, asserts that during quarters when employees accrued medical expenses and were on strike, the backpay specification offsets the contribution amounts employees would have paid had they continued working at Respondent during that period. However, the Region did not deduct the contribution amounts from backpay for strikers totals in quarters when no medical expenses were accrued.

Respondent cites *NLRB v. Rice Lake Creamery Co.,* 365 F.2d 888 (D.C. Cir. 1966), for the proposition that once the Respondent is required to reimburse any of the strikers for any health insurance claims that exceed their normal premiums then the backpay specification should offset employees' normal premiums for all strikers even in quarters when health insurance claims were not made, including those employees who made no claims for medical expenses for the duration of the backpay period. Respondent argues that all but three of the strikers participated in Respondent's health insurance plan prior to striking. Respondent argues the Region, in the backpay specification, only deducted employee plan contribution costs in quarters when the claimants incurred medical expenses, but failed to deduct the plan costs in quarters when they did not. Respondent argues this turns the concept of insurance upside down.

In *Rice Lake Creamery*, 151 NLRB 1113, 1130-1131 (1965), as per the Board's decision in enforcing the trial examiner's determination, medical claims of two employees were disallowed, because their medical claims were less than what they would have paid to maintain insurance coverage absent the discrimination, and medical claims of another employee were reduced by premiums that would have been paid by that employee up to the point of the medical expense loss. The trial examiner calculated the employee insurance premiums for 11 months prior to the time the employee accrued the medical expenses, and deducted that amount from the employee's medical claim. The trial examiner, as approved by the Board, rejected the respondent's claims that once one employee's medical claim was approved that the monthly premium should be deducted from the gross backpay computation for all discriminatees, including those who made no claims for medical claims reimbursement. In rejecting this claim for the remaining discriminatees, the trial examiner stated:

> In its brief, the Respondent contends for the first time that if these claims for medical and hospital expenses are allowed on the theory that the discriminatees "were covered by insurance protection" during the backpay period, the "Respondent is entitled to be reimbursed for the insurance risk to which it was exposed, and a fair value of such risk is the employee contribution that would have been made had the employees been actually covered." Accordingly, contends the Respondent, "the amount of $7.24 per month should be deducted from the gross backpay computation of all the strikers, including those not making any claim for medical expense reimbursement." In respect to this

> contention, the Respondent again misses the point of the Board's Order. Respondent is required to reimburse Delore King for his medical and hospital expenses, not because the Respondent furnished him with "insurance protection," but because that was a loss which he suffered as a result of the Respondent's discrimination for which he must be made whole. The claims of Madaus and Shervey were disallowed, and that of King was reduced, not because Respondent was exposed to an "insurance risk" and was therefore entitled to premiums for furnishing insurance coverage, but because to the extent that these discriminatees would have paid such premiums if reinstated when they should have been, they had not suffered the amount of losses claimed by them. The same rationale applies to the Respondent's contention in respect to the remaining discriminatees. The Respondent has not maintained their insurance, had incurred no expense for insurance coverage, and has been subjected to no claim on their behalf for hospital or medical expense. Under these circumstances, to permit the Respondent to benefit, although not an insurance carrier, by a setoff of premiums for insurance which was not provided, would produce the obviously absurd and inequitable result of allowing the tort feasor to benefit from his tort. Accordingly, the Respondent's contention, that backpay for the discriminatees should be reduced by the amount of the premiums which they would have paid for hospital and medical insurance if employed, is rejected.

The trial examiner further found that, even assuming arguendo that the respondent's contention had merit that:

> to prove that it was entitled to the requested offset, the Respondent was required to establish that no other like or substitute insurance was obtained and/or paid for during the backpay period by the discriminatees, and that it alone was responsible for the alleged "insurance risk" to which it was subject because of its act of discrimination. The record is barren of any such proof. There is no evidence that the discriminatees did not procure substitute hospital and medical insurance through other sources during the backpay period.

However, in *NLRB v. Rice Lake Creamery Co.,* supra at 893, the court disagreed with this aspect of the Board's decision stating:

> The Company contends that the Board has unreasonably allocated all the risk of employee medical expenses to it but has allowed it to deduct premiums only as a set-off to actual claims. We agree that this is unreasonable. The Board has constituted the Company the insurer without allowing it to deduct from an employee's salary the equivalent of premium payments unless the employee makes a claim for medical expenses, and only to the extent of the claim. Insurance by its nature is the allocation of risk to minimize the burden on the individual. If the men are made whole as if uninsured they pay no premiums but may make no claim for medical expenses. However, if they are insured so they can make a claim for medical expenses, they should pay premiums whether or not such expenses are actually incurred; otherwise they would be unjustly enriched. If the Company is to be constituted an insurer it should be allowed to deduct the premiums. It is only then that the employees are 'made whole,' that is, put in the same situation as if they had not been deprived of their employment by an unfair labor practice. The Company accordingly should be allowed to offset the amount of the premiums against amounts due to all discriminatees if it is required to pay the claim of an employee to the extent his expenses exceeded his premiums.

In *Sam Tanksley Trucking*, 210 NLRB 656 (1974), in computing backpay for discriminatee Terry, the judge, with Board approval, cited the court's decision in *NLRB v. Rice Lake Creamery Co.,* supra. There, in calculating Terry's reimbursement for medical expenses, the judge included Terry's premium cost for insurance for his entire backpay period, not just the quarters where Terry or his family incurred medical expenses. However, neither the judge nor the Board, required other employees who did not file a claim for medical benefits to deduct the cost of medical premiums from their backpay amount.

In *Cliffstar Transp. Co.* 311 NLRB 152, 168 (1993), the following was stated by the judge with Board approval:

> In *Rice Lake Creamery*, supra, 151 NLRB at 1130-1131, (a) medical claims of two employees were simply disallowed, because their hospital and medical claims were less than what they would have paid to maintain insurance coverage absent the discrimination, and (b) medical claims of another employee were reduced by premiums that would have been paid up to point the (seemingly, amount) of medical expense loss. It was also noted, albeit arising in other context, the Board has held benefits received by discriminatees through the substitute insurance is proper offset on a claim against an employer for the same losses.
>
> However, the employer there was *not* allowed by the Board to otherwise generally recover on the employer's claimed exposure to a general insurance risk for all employees, because discriminatees were deemed only being made whole for their (individual) loss suffered as a result of the discrimination practiced against them. Thus, a general setoff of the insurance premiums that would have been paid by all discriminatees was not allowed where the employer had provided no insurance generally. Although the court had there disagreed with the Board on this latter point, holding the company should be allowed to offset the amounts due to all discriminatees, if it is required to pay the claim of an employee to the extent his expenses exceed his premiums, *NLRB v. Rice Lake Creamery Co.*, supra, 365 F.2d at 893, the Board has continued to approve only a make-whole addressment of medical expenses minus premium payments, on an individual medical loss basis, e.g., *Sam Tanksley Trucking*, supra, 210 NLRB at 660-662.

Thus, in *Cliffstar,* the Board continued its policy of not allowing a general set off to a respondent employer of medical premiums for all discriminatees, but only allows a premium set off for those who incurred medical claims, or losses in obtaining other insurance during the backpay period. With due deference, to the court's pronouncements in *NLRB v. Rice Lake Creamery,* supra., I would recommend that the Board continue to adhere to this policy. It is fundamental in backpay proceedings that any uncertainties are to resolved in favor of the injured party, and his dependent against the wrong doer. See, *Cliffstar Transportation Co.,* supra., at 166; and *Iron Workers Local 15,* 298 NLRB 455 (1990). Here, Respondent created the situation at hand by its unfair labor practices prompting the strike and by failing to recall all striking employees immediately upon the Union's unconditional offer for their return to work. Upon the Union's unconditional offer to return to work, there is no evidence that for those it did not immediately recall, that Respondent notified them that they could reinstate their medical insurance at that time by paying insurance premiums. Moreover, these employees were not offered reinstatement so, even if they had been so notified, there was no basis to conclude that they could afford the insurance premiums that they had previously paid while working for Respondent. Thus, Respondent created a situation where the employees had lost their prior insurance coverage, had lost their prior income, and would likely have to forgo medical treatment during the backpay period that would have been available to them had Respondent

offered them immediate reinstatement. To penalize the whole group for insurance coverage that they were not given, because some found the means, or had sufficient need to obtain medical treatment regardless of expense during the backpay period, serves to grant a bonus to Respondent at the expense of the class of discriminatees, who as a whole were denied the use of these benefits during the backpay period.

In *Rice Lake Creamery*, supra., in calculating the amount of premiums to be deducted from a discriminatee's medical expenses, the trial examiner included all premiums that would have been paid through the date of the claimed medical expense including those premiums that would have been paid prior to the quarter in which the medical expense took place. In *Sam Tanksley Trucking*, supra., in calculating Terry's reimbursement for medical expenses, the judge included Terry's premium cost for insurance for his entire backpay period, not just the quarters where Terry or his family incurred medical expenses, thus the deductions for premiums included a broader period than just the quarters leading up to the incurred medical expenses. In the instant case, the compliance officer in her calculations used a more limited period for premium offset. In this regard, the compliance officer only deducted premiums for the quarter in which the medical expenses occurred. The Respondent did not challenge this aspect of the compliance officer's calculation. Rather, Respondent made the legal argument that premiums for all strikers should have been deducted for the length of the backpay period, regardless of whether they made a claim for medical benefits, once one of their fellow strikers has made such a claim. I have rejected Respondent's theory as not consonant with Board law, with which I am bound.

Moreover, I do not find the compliance officer's approach as unreasonable given the circumstances. See, *Minette Mills, Inc.,* 316 NLRB 1009, 1010 (1995), and cases cited therein for the proposition concerning gross backpay that "the General Counsel has discretion in selecting a formula which will closely approximate the amount due. The Government need not find the exact amount due nor adopt a different and equally valid formula which may yield a somewhat different result." While the current calculation involves medical insurance set offs I find that similar principles of discretion should be applied. In this regard, certain employees claimed medical expenses after the fact during particular quarters of their backpay period. For times outside those quarters, as was for their fellow strikers, by their delay in recall Respondent had removed access to their medical insurance and they would have had no reason to realize they would have been reimbursed for medical expenses during those times. In fact, had they been timely recalled, and knowingly put back on Respondent's medical plan they may have availed themselves to additional medical care under those benefits but for Respondent's unfair labor practices. Thus, I do not find limiting premium deductions to those quarters for which a particular employee claimed a medical reimbursement and only for that employee as unreasonable, as any ambiguity as to what would have transpired in terms of an individual's insurance usage should be shifted to Respondent which created it by its unlawful actions. This also comports with traditional Board procedures of computing backpay, interim earnings, and expenses by quarter.

B. The issues as to the individual strikers search for work

1. Stipulations

The parties reached a stipulation at the hearing via Jt. Exh. 1 that certain named individuals engaged in an adequate search for work during the entirety of their backpay periods, as defined in GC Exh. 3, and that the sole issues regarding those named individuals concerned matters set forth in paragraphs 3(b) and 3(d) of Respondent's amended answer filed on

September 25, 2013. The issues raised in the listed paragraphs of Respondent's amended answer relate to wage increases implemented during the respective backpay periods and the payment of health insurance premiums by strikers during their backpay period. As set forth above, I have found in favor of the General Counsel's position concerning these defenses raised by Respondent. Accordingly, pursuant to the parties stipulation at the hearing, I find that the backpay due for strikers Baker, Bratcher, Boone, Brown, Burton, Daniels, Day, Geris, Higgs, Koger, Limerick, Mackall, Merritt, Phoenix, Posey, Redmond, Robinson, Scurry, Taylor, White, and Windsor is set forth in the compliance specification, as amended, and stated in GC Exh. 3.[6]

2. Legal principles

The remaining issues in this case largely involve the bonafides of the job search of a discrete number of discriminatees. As such, the following cases provide a useful frame of reference. In *St. George Warehouse,* 351 NLRB 961, 961 (2007), the Board majority stated:

> The issue in this backpay proceeding is which party bears the burden of production when a respondent contends that a discriminatee has failed to mitigate damages by making a reasonable effort to find work.[FN3] It is well settled that backpay liability may be mitigated if the discriminatee neglected to make reasonable efforts to find interim work.[FN4] "The defense of willful loss of earnings is an affirmative defense, and the employer bears the burden of proof."[FN5]
>
> We reaffirm that a respondent has the burden of persuasion as to the contention that a discriminatee has failed to make a reasonable search for work. However, we reach a different conclusion with respect to a part of the burden of going forward with evidence. The contention that a discriminatee has failed to make a reasonable search for work

[6] There were 33 discriminatees listed in the initial compliance specification. However, the specification as amended at the hearing excluded Ellis Parran because the Region estimated he was owed no backpay. The parties stipulated at the hearing that the dates of the backpay period in terms of when a striker was reinstated or offered reinstatement are correct as listed in paragraph 1 of the compliance specification, and/or as amended for certain named strikers in G.C. Exh. 23 (a) with the addition of McFadden's end date being adjusted to February 27, 2012. In the case of striker Bridges the end date listed reflects his resignation from Respondent's employ. In the case of striker Higgs the end date listed is the result of a determination that he was no longer able to work. The parties also stipulated that the regular hours and overtime hours calculated by the compliance officer for the strikers gross backpay were correct. Since I have concluded the strikers were entitled to the disputed wage increases I have concluded, unless otherwise stated, that the compliance officer's gross backpay calculations for each of the strikers is correct. Respondent stated at the hearing it was also not disputing the claimed medical expenses listed in the amended compliance specification, aside from its argument that gross backpay should be reduced based upon certain medical insurance premiums that should be attributed to the pool of strikers. As set forth above, I have rejected this argument and based on the stipulations at the hearing, I have concluded that the medical expenses as set forth in the amended compliance specification and listed in GC Exh. 3 are appropriate and correct. Respondent also stipulated to the accuracy of the interims earnings calculated by the Region's compliance officer except for that relating to strikers: Bratcher, Higgs, Holder, Mackall, and Mendez. However, by subsequently agreeing to Jt. Exh. 1, as set forth above, which was inclusive of strikers Bratcher, Higgs, and Mackall, Respondent has removed those employees' interim earnings from dispute. Respondent also stipulated that the compliance officer's calculations concerning 401(k) contributions as reflected in the amended compliance specification and set forth in GC Exh. 3 are accurate.

generally has two elements: (1) there were substantially equivalent jobs within the relevant geographic area, and (2) the discriminatee unreasonably failed to apply for these jobs. Current Board law places on the respondent-employer the burden of production or going forward with evidence as to both elements of the defense. As to the first element, we reaffirm that the respondent-employer has the burden of going forward with the evidence. However, as to the second element, the burden of going forward with the evidence is properly on the discriminatee and the General Counsel who advocates on his behalf to show that the discriminatee took reasonable steps to seek those jobs. They are in the best position to know of the discriminatee's search or his reasons for not searching. Thus, following the principle that the burden of going forward should be placed on the party who is the more likely repository of the evidence, we place this burden on the discriminatee and the General Counsel.

In the instant case, the Respondent has met its burden as to the first element of the defense by presenting sufficient evidence of comparable employment opportunities in the relevant job market. The discriminatees and General Counsel have not met the burden as to the second element because no evidence was presented concerning the nature and extent of the discriminatees' job searches. Because existing Board law did not impose such an obligation on the General Counsel, we remand the case to the judge to reopen the record and permit the parties to produce evidence consistent with this decision.

The Board majority went on to state:

> In support of its case, the Respondent called Donna Flannery, a vocational employability specialist. Flannery conducted a labor market study in the New Jersey area to determine the availability of jobs for warehousemen, forklift operators, and similar occupations during the backpay period. Flannery examined published sources such as the *Dictionary of Occupational Titles, Occupational Employment Statistics, Projections 2008*, and *New Jersey Employment and Population in the 21st Century*, as well as want ads in local newspapers. She also performed an analysis of the transferability of job skills. Flannery concluded that a sufficient number of comparable jobs were advertised as open and available during the backpay period for warehouse workers and forklift operators. Flannery made the following observation:
>
> > It is also my opinion, based upon the information presented, that neither of these two job seekers made a diligent effort to seek and obtain new employment. It appears, from the information presented, that job efforts did not even consist of a minimal amount of effort to locate employment. Minimally, the advertisements could have been reviewed for openings. There were plenty of resources available, at no cost, such as assistance in reviewing/composing cover letters and resumes, and they could have sought openings through internet job sites, explored industrial directories for companies with suitable openings, researched magazines or publications in the warehouse industry for leads, and networked through job fairs and open houses.
>
> Flannery had not interviewed Tharp or Sides, and neither discriminatee was present at the hearing. No one who had any knowledge of their actual efforts to find employment testified. The General Counsel called no witnesses and relied solely on the amended compliance specification.[FN8] Id. at 962

***

The Board's approach, set forth above, has not been universally accepted.[FN11] Today, we modify the principles governing the issue of willful loss of earnings in one respect only. When a respondent raises a job search defense to its backpay liability and

> produces evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period, we will place on the General Counsel the burden of producing evidence concerning the discriminatee's job search. Id at 964.
>
> ***
>
> As noted, we make no change in the ultimate burden of persuasion on the issue of a discriminatee's failure to mitigate; the burden remains on the respondent to prove that the discriminatee did not mitigate his damages "by using reasonable diligence in seeking alternate employment." *Mastro Plastics*, supra at 175.[FN15] Id. at 964.

St. George Warehouse, supra was remanded by the Board to another judge who issued a second supplemental decision which was affirmed by the Board and eventually enforced by the third circuit. See, *St. George Warehouse,* 353 NLRB 497 (2008).[7] In his opinion in the second supplemental decision, the judge cited certain principles, in awarding full backpay to both discriminatees, stating:

> To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. The discriminatee must put forth an honest, good-faith effort to find interim work; the law does not require that the search be successful. Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent. *Midwestern Personnel Services,* 346 NLRB 624, 625 (2006) (citations omitted). Even though a discriminatee must attempt to mitigate her loss of income, the discriminatee is held only to a reasonable rather than to the highest standard of diligence. *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995). The sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period. *Grosvenor Resort,* 350 NLRB No. 86, slip op. at 2 (2007). Id. at 501.
>
> ***
>
> The Board has stated that "registration with a state unemployment office is prima facie evidence of a reasonable search for employment." *Avery Heights*, 349 NLRB No. 8(1), slip op. at 6 (2007);[8] *Bauer Group*, 337 NLRB 395, 399 (2002);[9] *Cassis Management Corp.*, 336 NLRB 961, 968 (2001); *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996). [10]Accordingly, Sides' registration with the New Jersey unemployment office without more establishes that he engaged in a reasonable search for work. Id. at 501.

---

[7] The Board's initial second supplemental decision was reversed by the court due to a lack of a quorum at the Board, but when a quorum was achieved at the Board it approved its initial second supplemental decision which was enforced. See, *St. George Warehouse,* 355 NLRB 474 (2010), enfd 645 F.3d 666 (3d Cir. 2011).

[8] A review of the decision in *Avery Heights,* 349 NLRB 829 (2007), reveals that some of the discriminatees merely kept records for their search to satisfy the demands of the state unemployment agency, and there was no evidence in that decision that the state agency otherwise aided those employees in their search for work.

[9] In *Bauer Group,* supra at 399, the judge specifically noted that discriminatee Fulger registered with the Florida Unemployment Commission and she had to submit weekly work search reports to that government agency. The judge with Board approval concluded that registration is prima face evidence of a reasonable search for employment citing *Allegheny Graphics,* 320 NLRB 1141, 1145 (1996), enfd. 113 F.3d 845 (8th Cir. 1997).

[10] See also, *Plumbers Local 305 (Stone & Webster),* 297 NLRB 57, 61 (1989) holding the meeting of the requirements to remain eligible for unemployment benefits is sufficient to remain eligible for backpay under the Act.; and *Newport News Shipbuilding,* 278 NLRB 1030 (1986),

***

The fact that he limited his search to places he could travel to by public transportation or by foot is reasonable and understandable. A discriminatee cannot be required to purchase or lease a car or take a taxi if he is unable to afford those means of transportation. The Board has recognized that the "individual circumstances" of the discriminatee must be taken into consideration in determining whether he has exercised reasonable diligence when searching for interim work. Such factors include "limited transportation." *Grosvenor Resort*, 350 NLRB No. 6, slip op. at 3 (2007) and "personal limitations." *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962). Further, Sides traveled by public transportation to work with the Respondent so his search for jobs with that limitation is consistent with his obligation to obtain comparable work. Id at 501-502

Sides also asked his friends for sources of work and in fact obtained the two temporary agency jobs, Labor Ready and J & J from his friends' suggestions. The fact that he accepted work at these agencies, although he would have preferred full time work demonstrates that he conscientiously sought to work. It is also significant to note that he sought permanent employment and continued to seek such employment even after he was hired by the temporary agencies. *Allegheny*, Graphics, 320 NLRB 1141, 1145 (1996). Id at 502.

The judge also stated that he considered the testimony of Respondent's expert witness, but did not find it persuasive. In this regard the judge stated:

The Board has generally given little weight to such evidence. "It avails a Respondent nothing to introduce a batch of newspaper ads… Such advertisements of jobs in newspapers generally are irrelevant, and are so here, because the evidence does not show, for example, whether the jobs would have been available had [the discriminatees applied, nor whether [the discriminatees] would have been hired had [they] applied." *Bauer Group*, 337 NLRB 395, 398 (2002); *Groves Truck & Trailer*, 294 NLRB 1, 5 (1989).[11] Id. at 503-504

Flannery did not speak with Sides or Tharp and did not contact any of the employers who advertised for help. In *Parts Depot, Inc.*, 348 NLRB No. 9, slip op. at 1, fn. 6 (2006), the Board stated that, on "numerous occasions [the Board] has refused to rely on expert testimony, similar to that offered here, where the expert is only 'referring to the probability of job opportunities, not to a given individual's situation' and he 'forms his opinions' about the claimant without having any personal knowledge of the latter's personal circumstances." See *United States Can Co.*, 328 NLRB 334, 343 (1999); *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991). Id. at 504.[12]

In *Midwestern Personnel Services, Inc.,* 346 NLRB 624, 625 (2006), enfd. 508 F.3d 418 (7th Cir. 2007) it was stated:

---

holding that registering with a government employment office is prima facie evidence of a reasonable search for employment.

[11] In *Airport Services Lines*, 231 NLRB 1272, 1273 (1977), enfd. 589 F. 2d 1115 (D.C. Cir. 1978), the Board stated,"[T]he newspaper want ads did not establish that the jobs would have been available if [discriminatee] applied or that [the discriminatee] would have been selected for any available positions." See also, *Florence Printing Co.*, 158 NLRB 775, 777 (1966), enfd. 376 F.2d 216 (4th Cir. 1967), cert. den. 389 U.S. 840 (1967).

[12] See also *Murbro Parking, Inc.*, 276 NLRB 52, 57 (1985); and *Delta Data Systems Corp.,* 293 NLRB 736, 739 (1989).

In support of its contention that certain discriminatees failed to mitigate their backpay, the Respondent called an expert witness, Dr. Malcolm Cohen, to testify about the conditions of the job market at the time in question. The Respondent also submitted a report by Dr. Cohen that showed the number of trucking positions available annually in Indiana and Kentucky. The Respondent and our dissenting colleague assert that this evidence indicates that certain of the discriminatees failed to make a reasonable search for interim employment. In agreement with the judge, we find that Dr. Cohen's report and testimony were insufficient to meet the Respondent's burden of demonstrating that the discriminatees failed to seek interim employment with reasonable diligence.

Dr. Cohen reviewed the "help wanted" section of four local newspapers, picked one day from each quarter during the backpay period, and counted the number of advertisements he deemed applicable to the discriminatees. However, he did not include data as to the pool of applicants, nor analysis regarding the ability of the discriminatees to secure the trucking positions he identified. In addition, Dr. Cohen's findings focused on the number of trucking positions statewide, rather than in the geographic area in which the discriminatees lived. With regard to the "help wanted" ads, Dr. Cohen made no mention of whether the jobs would be comparable to the wages and hours of the discriminatees' former positions. The Board has previously found that the existence of "help wanted" advertisements does not serve to meet the Respondent's burden of proving that the discriminatees failed to search for work with reasonable diligence. *Acme Bus Corp.*, 326 NLRB 1447, 1448-1449 (1998); *Coronet Foods, Inc.*, 322 NLRB 837, 842 (1997), enfd. in relevant part 158 F.3d 782 (4th Cir. 1998). For these reasons, we find that this evidence has little probative value.

In *United States Can Co.,* 328 NLRB 334, 337 (1999), enfd. 254 F.3d 626 (7th Cir. 2001), it was stated that:

> It should be noted, however, that a backpay claimant is not held to the highest standard of diligence in seeking interim employment, but is only required to have made reasonable exertions. Thus, an employer does not satisfy its burden showing that no mitigation took place because the claimant was unsuccessful in obtaining interim employment, by showing an absence of a job application by the claimant during a particular quarter or quarters of a backpay period, or by showing the claimant failed to follow certain practices in his job search, e.g., reading and responding to job advertisements in newspapers. *S.E. Nichols of Ohio,* 258 NLRB 1, 11 (1984). Finally, any uncertainties or ambiguities must be resolved against the wrongdoer whose conduct made such doubts possible. *Teamsters Local 469 (Coastal Tank Lines),* 323 NLRB No. 23 (1997).

In *Kawasaki Motors,* 282 NLRB 159, 160 (1986), enfd. 850 F.2d 524 (9th Cir. 1988), the judge, with Board approval, took into account the stigma of an employee's discriminatory discharge from the respondent employer in evaluating the bonafides of his job search. It was stated in *JI Shiang, Inc.,* 357 NLRB No. 108, slip op. 2, "When a respondent argues that a discriminatee has willfully avoided or failed to retain substantially equivalent work, it must adduce evidence demonstrating that the discriminatee voluntarily quit interim employment or lost interim work through deliberate or gross misconduct. *Baker Electrics*, 351 NLRB 515, 565 (2007), citing *Minette Mills*, 316 NLRB 1009, 1010 (1995); *Basin Frozen Foods*, 320 NLRB 1072, 1077 (1996)." In *Newport News Shipbuilding,* 278 NLRB 1030, 1030 fn. 1(1986) the Board stated:

We adopt the judge's finding that claimant Price's backpay should not be reduced based on her discharge for cause from various interim employment. In so doing, we do not agree with the judge's rationale to the extent that he finds that a discharge for cause from interim employment cannot be a basis for reducing backpay. We conclude, however, that the Respondent has not established on the facts here that the conduct for which Price was discharged from interim employment was such willful or gross misconduct as to constitute a willful loss of earnings. See generally *Sylvan Manor Health Care Center*, 270 NLRB 72, 75 (1984), and cases cited therein.

In *Amshu Associates, Inc.*, 234 NLRB 791, 794 (1978), it was held that a discriminatee made reasonably diligent search to secure work including reading want ads and responding by telephone, consulting superintendents, friends, relatives, and the local union, registering with state unemployment office, and making other inquiries. The Board has held that, in seeking interim employment, a discriminatee need only follow his regular method for obtaining work. See *Tualatin Electric, Inc.*, 331 NLRB 36 (2000), enfd. 253 F.3d 714 (D.C. Cir. 2001) (discriminatees satisfied their obligation to mitigate when they followed their normal pattern of seeking employment through the union's hiring hall). Long periods of unemployment or underemployment do not necessarily equate to a showing of lack of reasonable diligence. *McKenzie Engineering*, 336 NLRB 336, 344 (2001), enfd. 373 F.3d 888 (8th Cir. 2004).

3. The testimony of the Region's compliance officer

Heather Keough has been the compliance officer for Region 5 since December 2011, and she served as the acting compliance officer for six months prior to that time. Keough performed the calculations and drafted the compliance specification in the current case. Keough testified that: As part of the Region's compliance investigation, the Region sent questionnaires to each of the discriminatees, the initial one being sent in March or April 2013. The Region sent out the questionnaires at that time because they had received a court judgment enforcing the Board's Order. The mailing included a cover letter explaining the contents of the packet which included questionnaires for each quarter of the backpay period. Keough testified the Region did not follow its regular procedures in sending the questionnaires out to the discriminatees in this case. She testified they are ordinarily sent to the discriminatees on a quarterly basis once the complaint issues. Keough could not explain the delay of the mailing in this case.

Keough identified a sample questionnaire that was sent to the discriminatees which showed that, among other information sought, the discriminatees were asked to report to the Region their search for work efforts per quarter for each quarter of the backpay period. Keough testified, based on her experience as a compliance officer, the Region's questionnaire can confuse certain recipients, which in this case resulted in her sending duplicate questionnaires to some of the discriminatees if their questionnaire came back with portions blank, or if she did not understand the response. She testified she would conduct a brief phone interview with the discriminatee if their initial questionnaire raised questions and in some cases send them another questionnaire.

Keough testified she sent the packet of questionnaires for the multiple quarters of the backpay period all at once to each of the discriminatees in one mailing. Keough testified about a dozen of the discriminatees checked the strike duty box in the unavailable to work section of the questionnaire. She testified she phoned those individuals to verify whether they were available for work while performing strike duties; or whether they meant they were unavailable for work that quarter because of the strike duties. Keough testified she learned that some of them checked the strike duty box as being unavailable for work during a

particular quarter, but were actually searching for work. She testified she concluded that when the strike duty box was checked, it did not mean the individuals were unavailable for work so she did not reduce or toll their gross back pay for those quarters. Keough testified the backpay period began on July 6, 2010, for all discriminatees because that was the first day of missed employment as a result of the refusal to reinstate. She testified the length of the backpay period varied for the discriminatees depending on their recall dates by Respondent, or when they declined reinstatement or resigned their position at Respondent.

Keough testified that in addition to the questionnaires and other records provided to the Region by the discriminatees such as notes, tax records, W-2's, and paystubs, she obtained earning records from the Social Security Administration for certain employees, as well as employment records from the Maryland Department of Labor, Licensing, and Regulation (DLLR) as aides in calculating interim earnings. She testified she subtracted strike benefits the employees received from the Union on a quarterly basis from the employees' gross backpay in a manner akin to reductions for interim earnings. Keough testified the reports from the Maryland DLLR showed the period of time during the backpay period when the discriminatees received unemployment. Keough testified the Region relied on the receipt of unemployment benefits as their primary consideration in determining that the discriminatees had performed a reasonable search for work at least for the periods that they received the benefits. Keough testified it was her understanding that in order to receive Maryland unemployment benefits; a claimant has to be available for work and searching for work for each week that they receive benefits. She testified that, at the time of her testimony, she thought a claimant had to call in weekly to the Maryland DLLR to certify that they met those requirements. She testified that she thought that, during the backpay period for the discriminatees, they had to call in bi-weekly to certify that they were available for work and searching for work.[13]

Keough testified when the Region sends the questionnaires there is a deadline provided in the cover letter for their return. She testified sometimes in an effort to meet the deadline, a discriminatee will send the questionnaire back incomplete in terms of their search for employment in that they will not write anything for fear of writing something that may be inaccurate. She testified once the discriminatee is informed the Region needs the information to the best of their recollection then the Region will receive additional information.

Respondent stipulated that the Region's interim earnings information was accurate for the strikers, except for Trevor Holder and Adalberto Mendez. Keough testified Holder did not have any earnings from interim employment, during his backpay period, but that he did receive striker benefits from the Union. Keough testified she reached that conclusion based on Holder's representations to the Region that he did not receive any interim earnings, which was confirmed by reports received from the Maryland DLLR. Keough testified Mendez did not have any earnings from interim employment until the fourth quarter of 2012. So for nearly all of the backpay period, the Region subtracted only the striker benefits he received. In the fourth quarter of 2012, he reported that he worked two exhibition shows, and those earnings were also reported on the Maryland DLLR report. I have found Keough's calculations for Holder and Mendez' interim earnings to be correct.

[13] The Union in its brief cites Md. Code Ann., Lab & Empl. Sec. 8-903 requiring an unemployment claimant in order to be eligible for benefits to be able to work, available to work, and actively seeking work. The Union cites the Maryland DLLR Division of Unemployment Insurance Website as instructing claimants that they must make at least two job contacts per week, and include in their records certain information documenting their job search.

4. The testimony of Respondent's witnesses and other witnesses concerning the availability of interim employment during the backpay period

John Duberg was called as a witness by Respondent. He testified he is a senior consultant with Sage Policy Group, Incorporated in Baltimore, Maryland. He testified the majority of the work he has done in the past 30 years involved the quantitative analyses of labor markets. He testified he is not a vocational expert that he considered himself to be a quantitative analyst. Duberg testified that he is an economist, but he did not have a degree in economics. Rather he has a degree in political science and a master's degree in urban regional planning. Duberg testified that, part of his job, is to study labor data in industries. Duberg testified he was present to testify about job openings in the period of time between 2010 and 2012. During the course of his testimony, Respondent never sought to qualify Duberg as an expert witness. Duberg also testified he had no contact with any of the workers at Respondent, nor did he look at the resume of any of the discriminatees. He did not know their ages, or their prior employment history. He testified he had no personal knowledge of the discriminatees' life circumstances. For the reasons set forth below, I did not find Duberg's testimony to be very helpful concerning the outcome of this case.

Respondent offered a chart Duberg had created entitled, "Employment Forecast by Sector: Washington DC Metropolitan Area" for the years 2010 to 2012. Duberg testified it was a forecast or estimate of net new jobs that were created in the Washington, D.C. metropolitan area in all non-farm sectors of the economy. The chart was extrapolated from a forecast for the period of 2010 to 2030 contained in a document entitled "Housing the Region's Future Workforce." Thus, Duberg merely took the numbers from a chart contained in the underlying document, and by simple division used that to predict how many jobs were in various categories some of which he testified related to the discriminatees' background for the time period of 2010 to 2012. Duberg's initial calculations were off for this and a number of other charts he prepared because he calculated the wrong number of total years in the underlying chart, using 20 years instead of a 21 years for the denominator in making his estimate. Moreover, I do not find simple division pertaining to a long term prediction of jobs over a 21 year span would accurately reflect the individual nuances of area growth for any particularly year. For example, Duberg testified the country was in a severe recession from 2007 to 2009. He testified after the recession ended unemployment has only come down slowly over time.[14] Thus, while a prediction of the future as to what will take place over the course of the next 21 years may have its usefulness for long term housing planning, I do not find it can said to accurately depict job vacancies for any given year or years during that 21 year period. Finally, the Washington D.C. Metropolitan area in the chart, as demonstrated by the underlying study from which it was taken, covered the District of Columbia, five counties in Maryland including Frederick, 10 jurisdictions in northern Virginia and even one in West Virginia. Duberg testified that northern Virginia is a particularly dynamic area. Thus, even if I were to place reliance on Duberg's chart, which I do not, there is no way to tell from the number of jobs it shows the number that the discriminatees would have been qualified for, or even more tellingly would have been within their commuting distance.

[14] In this regard, the General Counsel introduced data from U.S. Bureau of Labor Statistics showing unemployment in the District of Columbia in July 2010 at 10.3 percent; in July 2011 it was at 10.7 percent; in June 2012 it was at 9.2 percent; and in November 2012, it was at 8.2 percent. In Prince George's County where Respondent is located in July 2010 unemployment was at 8 percent; July 2011 it was at 7.6 percent; in July 2012 it was at 7.2 percent; and in November 2012 it was at 6.6 percent.

Duberg also identified a chart entitled, "Openings for Selected Transportation and Material Moving Occupations in Maryland: 2010-2012." He testified the chart represents data from the Maryland DLLR on certain occupations within the transportation and material moving industries. Duberg testified the occupational titles listed in the chart were consistent with the kinds of work that was being handled by Respondent. The chart contained numbers of net new jobs, which Duberg testified were jobs that were created that previously did not exist. There is another column in the chart entitled openings which the chart describes as vacancies due to death, retirement and someone leaving the state. Duberg testified the source for the chart was based on projections covering the years 2010 to 2020. He testified this is the best forecast for occupations in Maryland. It's provided by the Maryland DLLR, which works with the U.S. Department of Labor to create the data. Thus, here again Respondent presented a chart based on estimates over a much longer period of time, and extrapolated data from the chart with the simple division, without taking into account the actual employment circumstances of any given year. When asked if the underlying 2010 to 2020 forecast is a reliable indicator, Duberg testified, "It usually is, yes. It is almost -- any forecast, it's guaranteed to be wrong because every forecast is wrong, but it is the generally accepted standard for looking at the future."[15] Duberg created another chart using a similar process entitled, "Opening for Selected Installation, Maintenance, and Repair Occupations in Maryland: 2010-2012." Duberg testified he did not actually go over the employees in dispute in this proceeding to see if they were qualified for any of these jobs listed in either of the above charts. He testified that he did not do that for the prior exhibit either. Duberg made a similar chart for openings for "Selected Retail Sales and Related Occupations in Maryland: 2010-2012." He testified he made this chart because the information he reviewed from employees of Respondent in their search for work they made a number of applications to retail businesses. Duberg testified the retail sales on the chart could include high-caliber clothing stores and stores like Best Buy or technical stores. Duberg did not do an analysis of the types of retail jobs the discriminatees applied as a percentage of the number of jobs listed in his chart. Duberg's testimony concerning the applicability of the jobs listed in his charts was that the discriminatees may have qualified for all, some, or none of them. The charts also applied to the entire state of Maryland, and there is no way to tell from these particular charts if the described jobs are in the commuting range of the discriminatees. Thus, Duberg's charts are extrapolations from long term projections, which he admits are usually wrong. They do not take into account the nuances of the economy at the time of the backpay period, the commuting distance of any of the jobs even if I were to give the charts any weight, nor do they demonstrate whether an individual discriminatee may have been qualified for any, or what number of the jobs listed. I do not find these charts as particularly useful in evaluating an individual employee's job search.

Respondent also tendered a series of charts created by Duberg entitled "Selected Top Demand Jobs Requiring a High School Diploma or Less:" specifying openings for 2010 to 2012 for Prince George's County, Montgomery County, Anne Arundel County, and one chart for three

[15] For the category "driver/sales workers" listed in Duberg's chart, Duberg testified the occupational title describes a position but it does not go into qualifications. He testified a CDL license would not necessarily be a requirement for someone in this category. Duberg testified he did not have personal knowledge of all the requirements and criteria that might apply to positions that would fall under that occupational title. Duberg testified the occupational qualifications that would be required for each of the positions under driver/sales workers vary by employer. Duberg testified in a similar fashion for the occupational category "Truck Drivers, Heavy and Tractor-Trailer." As for all the jobs listed, Duberg testified the discriminatees might qualify for some or all of the jobs, that he did not meet with or review the qualifications of the individual employee or the potential employer.

counties in southern Maryland. Duberg testified Respondent is located in Upper Marlboro in Prince George's County, Maryland, and the majority of the workers live in Prince George's County. The number of jobs listed in each category were not actual available jobs, but rather were just estimates extrapolated from projections for the period of 2008 to 2018. The number of jobs listed in Duberg's initial charts had to be downgraded with new charts because Respondent conceded that the number of jobs in the initial charts submitted by Duberg were incorrectly calculated. Here again, the job numbers listed were projections, as opposed to actual jobs, and they did not take into account commuting distance, or backgrounds of the actual discriminatees.

Thus, I do not give much weight to Duberg's charts or his testimony concerning the availability of jobs for the discriminatees. He did not meet with the discriminatees, review their qualifications, age, or take into account their life circumstances in terms of their availability to commute. The charts he created were based on projections which he admitted were not likely to be accurate, as opposed to actual jobs and most of them covered a broad geographic area beyond Respondent's location. As set forth above, the Board has given little weight to such opinion testimony. See, *St. George Warehouse, Inc.,* 353 NLRB supra at 503-504; *Bauer Group*, 337 NLRB 395, 398 (2002); *Groves Truck & Trailer*, 294 NLRB 1, 5 (1989); *United States Can Co.*, 328 NLRB 334, 343 (1999); *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991); and *Midwestern Personnel Services, Inc.,* 346 NLRB 624, 625 (2006), enfd. 508 F.3d 418 (7th Cir. 2007).

Duberg testified concerning an internet website known as the Wayback Machine. He testified it is an archive of some information that has been available through the internet over time. Duberg testified the data is compiled from snapshots of websites and it has a variety of websites, including several that relate to trucking and trucking related positions. Duberg testified that unlike newspapers, a lot of what the internet does is ephemeral; it is not maintained in archives by common job listers. However, the Wayback Machine website does have some snapshots of historic job listings that were provided through different websites. Amelia Tolbert works for Respondent's law firm as a litigation paralegal. Tolbert testified she was given an assignment on September 29, 2013, to use the Wayback Machine website to search for job postings that had happened between July 2010 to December 2012 that dealt with trucking and warehouse jobs around the PG County area. There was around a 20 mile geographical limit. Tolbert testified she went onto Google and found websites that had postings for the relevant jobs, and then she took the website address of her search, and placed it into the Wayback Machine website. Tolbert thereafter produced a compilation of her search result from her Wayback Machine assignment. Tolbert testified she could not recall exactly what search terms she used in her initial Google website search stating "it was probably something like trucking jobs PG County or trucking jobs Maryland, something like that." Tolbert could not recall if she searched PG County or Maryland, stating "I might have done both. I can't remember." When asked if she searched for Montgomery County, Tolbert replied, "whatever I searched for, I searched for everything like around an area within 20 miles."

As set forth above, Tolbert could not recall the specifics of the search she made as to terms or location. There was no independent verification that the website posting purportedly picked up by the Wayback Machine were actually posted; that the discriminatees would have had access to the postings if they existed; or that they qualified for the jobs, or would have been hired if they applied. The Board has rejected the use of newspaper help wanted ads to establish that a discriminatee failed to perform a proper job search, and I find the use of the Wayback Machine site here is even more attenuated then usage of newspaper ads. See, *Acme Bus Corp.*, 326 NLRB 1447, 1448-1449 (1998); *Coronet Foods, Inc.*, 322 NLRB 837, 842 (1997), enfd. in relevant part 158 F.3d 782 (4th Cir. 1998); *Airport Services Lines*, 231 NLRB

1272, 1273 (1977); and *Florence Printing Co.*, 158 NLRB 775, 777 (1966), enfd. 376 F.2d 216 (4th Cir. 1967), cert. den. 389 U.S. 840 (1967). Accordingly, I place no reliance on Respondent's Wayback Machine exhibit in evaluating the bonafides of the job search of the discriminatees.

Ralph Palmigiano works for Respondent as a recruiter. Palmigiano testified the Maryland Workforce Exchange is a website he frequently uses for his work. Palmigiano identified documents he downloaded from the Maryland Workforce Exchange website containing job descriptions for "heavy and tractor-trailer truck drivers;" for "light truck or delivery services drivers;" and for "laborers and freight, stock and material movers, hand." While Palmigiano testified the documents were downloaded from the Maryland Workforce Exchange the documents revealed their source was the U.S. Department of Labor Bureau of Labor Statistics. The documents made predictions for the period of 2010 to 2020 for job growth of each of the positions listed. Palmigiano testified he thought Respondent's CDL driver position corresponded with the definition in the first job description. Palmigiano testified Respondent's warehouseman position would correspond to the Maryland Workforce Exchange position of laborers, freight and stock, material movers. I did not find the referenced materials to be particularly helpful, in that like Duberg's charts they were based on estimates of growth over a lengthy year period, which Duberg admitted were not accurate. Moreover, the tables Palmigiano introduced did not identify any specific jobs that existed during the backpay period that were within commuting distance of the discriminatees, nor did they establish they would have been qualified or been hired if they applied to any such jobs, the existence of which from the tables was merely surmise.

Palmigiano generated another series of reports which he testified he downloaded from the Maryland Workforce Exchange. It included "required education level on jobs advertised online for Transportation and Material Moving Occupations," with separate charts for the years 2010, 2011, and 2012, the education level and location for each of the years. For example, for 2011 for Prince Georges County with a high school diploma or equivalent it showed 258 job openings. The table did not show what other requirements or licensing may have been necessary for these jobs, or specify what the jobs were. It did not show the specific location of the jobs within the county. Palmigiano could not specify which advertisements any of the jobs were actually listed under stating he merely downloaded the tables from the Maryland government site. These charts based on unidentified online advertisements, for non specific jobs, with a location of the entire county, in my view for the reasons previously stated do not help to evaluate whether the discriminatees performed a proper job search.

While I do not place great reliance on the testimony of Respondent's witnesses in terms of establishing viable jobs for the discriminatees during the backpay period, I do find that Respondent has met its burden of establishing there were jobs to which the discriminatees could have applied for. In this regard, I note that Respondent was located in Prince Georges County, Maryland, not far from the D.C. border, and this is a highly populated area. So, it is unlikely to say that during a two year period there were no jobs in this area for which the discriminatees could have applied. Second the testimony of the discriminatees relating to their job searches demonstrates that there were jobs to apply to, whether or not the discriminatees would have been successful in their application. Moreover, it was the compliance officer's view that given the education and skill level of the discriminatees that entry level retail and food service jobs would appropriately be included in the purview of their job search. Here, several employees testified they applied to or inquired about multiple jobs within the backpay period. Some obtained interim employment for portions of the backpay period, and some testified they

were able to find listings for multiple truck driver and/or warehouse jobs even though they may not have been successful in obtaining those jobs.

For example discriminatee Daniel Wiggins testified that during July 2010 he used the Washington Post for his job search efforts and he followed a few leads obtained from there. Wiggins testified he looked in the warehousing and truck driving section in the classifieds. He testified he also applied for some things that he had never done before. In addition to the Washington Post, Wiggins looked in the local paper called the Gazette and he also looked in the Baltimore Sun and the City Paper. Wiggins testified he applied to quite a few jobs in July 2010. Wiggins testified he used Monster.com as part of his job search in July 2010. He testified he sent numerous resumes to all types of employers through Monster. He estimated that he sent around 20 resumes on the site in July 2010. Wiggins testified another site he used was Indeed.com. He estimated that he forwarded 15 to 20 resumes or applications through Indeed in July 2010. Wiggins testified concerning his search on Monster, Indeed, the Washington Post, and the Baltimore Sun that they had jobs listed and there were a number of jobs to apply to. Wiggins testified he reviewed an employment guide which lists employers, education, and certifications. Wiggins testified he applied to quite a few jobs out of the employment guide. He testified he filled out a lot of applications online for trucking jobs. Wiggins testified he also used the site Job Search USA as a job search engine.

Similarly, Derrall Bridges testified he applied to over 70 jobs on government sites during his backpay period. Bridges testified he would go on the Prince Georges County government site and search for truck driving jobs and maintenance jobs. Bridges testified he also used Monster.com. during the backpay period. He estimated he went on Monster around once a week. He testified he started using the site in July 2010. He testified he applied to two or three jobs a month during the backpay period through the use of the Monster site and other websites.

Thus, the other discriminatees, who testified, all testified they found jobs to apply to during the backpay period, and as Respondent points out in its brief as reflected in Keough's summaries some of the discriminatees found interim employment at various points during their backpay period. I therefore find Respondent has met its burden that there were at least some available jobs during the backpay period within commuting distance, for which the discriminatees may have qualified, and that the burden has shifted to the General Counsel to establish that each of the discriminatees made a reasonable job search in order to qualify for backpay. I find the ultimate burden still lies with Respondent to demonstrate that search was not adequate for each challenged discriminatee. The fact that there may have been jobs to apply to has no relationship in terms of the likelihood of success of an individual discriminatee, whose application may have been impacted by such factors as age, past experience, commute, length of their employment at Respondent, and having to explain that they were on strike as a reason they were seeking work.

5. The job search of the disputed discriminatees

a. Daniel Wiggins

Wiggins was not working for Respondent at the time of his testimony. Wiggins backpay period ran from July 6, 2010 to April 8, 2012.[16] He collected state unemployment benefits from

[16] Wiggins failed Respondent's drug test upon Respondent's offer of reinstatement. Wiggins credibly testified that he did not fail any drug tests with interim employers or prospective interim

July 3, 2010 until October 9, 2010. Wiggins was born in 1979. Wiggins graduated high school and then went to the Fork Union Military Academy postgraduate program. He graduated and then went to Bowie State. He left college during his junior year without obtaining a degree. Wiggins testified that, prior to working for Respondent, he was a truck driver and he held his Class A CDL license since 2002. Wiggins testified that before he was a truck driver he worked in warehouses, drove a forklift, picked orders, and did things of that nature. Wiggins testified that, after he obtained his CDL, he became a truck driver and has been a truck driver ever since. Wiggins was hired by Respondent in September 2007. He worked for Respondent as a delivery driver for which he had to have a CDL. Wiggins testified his Class A CDL license allows him to operate vehicles with trailers, and heavier vehicles than drivers with a Class B CDL.

Wiggins testified he received unemployment benefits during his backpay period. Wiggins testified he stopped receiving unemployment because he started working at S. Freedman & Sons, and he never applied for unemployment again. Wiggins testified that, during his backpay period he lived in District Heights, Maryland; and Beltsville, Maryland. He testified that he also had to move near Emporia, Virginia, where he lived from about December 10, 2010 until June 2011.

Wiggins testified he received the Region's backpay questionnaire concerning his search for work, around a week prior to when the Region said he needed to submit it, because it was sent to the wrong address. Wiggins estimated he received it in March 2013. On the questionnaire, Wiggins checked unable to work from April 16 to September 30, 2010, and he checked the same for October 1, 2010 to October 5, 2010. On both occasions, he checked the strike duty box. However, Wiggins denied that by checking the strike duty box that he was saying he was not available to look for jobs. He testified, "Actually I didn't really understand truthfully what the form wanted. I filled it out to the best of my understanding." He explained "I just felt kind of pressured to try to get it back." Wiggins testified that during his backpay period there was no time he was unable to work and that if he had been offered a job he would have been able to take it. I credit Wiggins' explanation concerning his confusion as to the requirements of questionnaire and find he was available to work throughout his backpay period, noting he reported on the questionnaire that he secured employment from October 6 to December 5, 2010 with S. Freedman & Sons. Wiggins testified he worked there for 3 months and then was terminated.

Wiggins testified he began working at S. Freedman & Sons, based on a referral by the Union. He testified he was still searching jobs while he worked there because S. Freedman & Sons, "treated us kind of indifferent because we were a part of the strike." Wiggins testified he had been on interviews when they asked him his last employer and he mentioned Respondent and the reason he was no longer at that job that "it did not look good on me."

Wiggins testified, when asked, concerning his employment for S. Freedman & Sons, that he was not terminated for gross misconduct. Wiggins credibly testified as follows: Wiggins was discharged during his 90 probation period due to an argument with the dispatcher. The argument was in the morning and it concerned the way Wiggins' truck was loaded. In this regard, a hand truck had been placed on the top of the back of materials in his truck and when he lifted the back door the hand truck almost fell on his head. Wiggins went out on the road with the truck. When Wiggins returned to the facility he was told he did not call back in a timely fashion and they walked him off the premises stating he was in his 90 days and they terminated

---

employers during his backpay period, and Respondent has not raised this as a defense to his backpay in its post-hearing brief, which if it had would have been rejected.

him. He explained in his testimony that they called him a couple of times while he was out of the truck making deliveries. Wiggins testified the hand truck should not have been loaded the way it was and it was dangerous. He testified he arrived at the facility at 5 a.m. and it was dark and difficult to see. He testified when he opened the lift gate, he could not have something at the top ready to fall on his head. Wiggins testified concerning his termination at S. Freedman that there was no physical confrontation and he did not curse. I have credited Wiggins' testimony concerning his termination at S. Freedman & Sons, noting that it was put forth with good recall and not disputed. I find that Wiggins made a reasonable protest during his probationary period there about conduct by the employer that he legitimately thought jeopardized his safety.

Respondent argues in its brief that Wiggins backpay should be terminated due to his discharge from S. Freedman and Sons. I reject this defense as I do not find that Respondent has established that Wiggins was discharged from interim employment for conduct of such an aggravated nature as to constitute willful or gross misconduct that terminates Respondent's backpay liability. See, *JI Shiang, Inc.,* 357 NLRB No. 108, *Baker Electrics*, 351 NLRB 515, 565 (2007); *Minette Mills*, 316 NLRB 1009, 1010 (1995); *Basin Frozen Foods*, 320 NLRB 1072, 1077 (1996); *Newport News Shipbuilding,* 278 NLRB 1030, 1030 fn. 1(1986); and *Sylvan Manor Health Care Center*, 270 NLRB 72, 75 (1984).

Wiggins did not know if the Union had a hiring hall. Wiggins testified the Union did state while they were on strike that they could go to the union hall on certain days and they had some individuals looking for forklift operators. However, Wiggins testified, "But it was numerous times that I went down there, and no one was there at six in the morning." Wiggins testified he went there at 6:00 a.m. because that was when the Union stated men would be out there looking for workers. Wiggins testified he used such websites as Monster and Indeed in his job search and that he went to Aerotek Staffing and Randstad to help secure employment. Wiggins testified he went to numerous places and he applied to a lot more jobs than he listed on the Region's questionnaire. Wiggins testified he also looked at classified ads in the Washington Post.

Wiggins testified that during July 2010, he used the Washington Post for his search efforts and he went on a few leads from there. He testified that he reviewed the Post classifieds at least 30 to 40 times in July 2010. Wiggins testified he also did numerous searches online and sent resumes out. Wiggins testified as soon as the strike started he was on a constant job search. Wiggins testified he looked in the warehousing and truck driving section in the Post classifieds, and he applied to some non related jobs. In addition to the Post, Wiggins reviewed the classifieds in a local paper called the Gazette, in the Baltimore Sun and the City Paper. Wiggins would also swap information about leads with men on the strike line. Wiggins testified he applied to quite a few jobs in July 2010. Wiggins testified he also reviewed an employment guide and he applied to quite a few jobs out of the employment guide. He testified he filled out a lot of applications online for trucking jobs.

Wiggins testified that in addition to what he included in the questionnaire he contacted DPI, a cold storage warehouse, in July 2010 seeking employment as a Class A CDL driver. Wiggins testified he went on the road test and interview for DPI but never heard back from them. Wiggins testified that in July 2010 he also went to McCardle for a driver job and he filled out an application there. Wiggins testified he also filled out an application at Rexel and they sent him a letter stating the position had been filled, and he later reapplied to Rexel.

Wiggins testified he used Monster.com as part of his job search in July 2010, and throughout the backpay period. He testified he has a resume registered on the Monster site, and he sent numerous resumes to all types of employers through Monster. He estimated that he sent around 20 resumes on the site in July 2010, and that in July 2010 he visited Monster almost every day. Wiggins testified another site he used was Indeed.com. He testified in July 2010 through Indeed he sent a resume to Daycon and to quite a few other companies. He estimated that he forwarded 15 to 20 resumes or applications through Indeed in July 2010. Wiggins testified he also used the site Job Search USA.

Wiggins testified that Vulcan Concrete is located in Savage, Maryland. Wiggins testified he went to their place of business and filled out an application. He estimated this took place in July or August 2010 and that he went there at least four or five times badgering them about hiring him. Wiggins testified he applied to Aggregate Industries because his wife used to work there. He testified he went there quite a few times, was told somebody was going to call him, but he never heard from them. Wiggins testified he started visiting them in July 2010 and stopped around the second week of September 2010.

Wiggins testified he applied with DC Metro for a driver job in 2010 before he worked at S. Freedman, and that he contacted Metro after he worked there. He testified he contacted them quite a bit. Wiggins testified he also applied at the MTA in August 2010 and that he was seeking a job as a bus driver. Wiggins never heard back from them. He testified his CDL does not qualify him to drive a bus but he could take a passenger endorsement and take an extra test so he could operate that vehicle.

Following July 2010, during the remainder of the backpay period, Wiggins continued to read the Washington Post and Baltimore Sun in his search for work. He also continued to look at the City Paper. While living outside the DC and Baltimore Metropolitan areas he was not able to get the DC City Paper or the Baltimore City paper. He testified he was able to review the Washington Post and he looked at it 3 to 4 times a week. Wiggins testified he used Monster.com, Indeed.com and Jobsearch USA throughout the back pay period. Wiggins testified he used Monster.com virtually every day; Indeed.com every day or every other day; and Job Search USA 2 to 3 times a week.

Wiggins moved to the Emporia, Virginia area in December 2010 and remained there until June 2011. He testified Emporia, Virginia has two main warehouses, and that along with fast food that is the gist of their local employment market. Wiggins testified that adults work at McDonald's because the employment situation there is very bad. Wiggins testified he had no choice but to move to the Emporia area because otherwise he would be out on the street. He testified he moved in with his mother and he did not want to move there. While living near Emporia, Wiggins sought work in Richmond and St. Petersburg, Virginia.

Wiggins testified Richmond is about 60 miles from Emporia. While living in Virginia, Wiggins applied at Canada Dry because he had worked there previously. He applied to BFI which is a trash company, Waste Management. He applied to Allied Automotive Group, which is a car hauling company, which his father and brother worked for. Wiggins testified that Allied Automotive had been purchased and they are now called Jack Cooper. Wiggins testified he applied to numerous other jobs through Monster because Monster brings up jobs in Richmond. Wiggins testified that he made the job contact for BFI in February or March 2011; that he applied to Canada Dry in December 2010; and that he could not recall when he applied to Waste Management but testified it was in Richmond. Wiggins also applied to a Waste

Management facility in Linthicum, Maryland. He contacted them in December 2010, prior to moving to the Emporia area.

For the period January 1 through March 31, 2011, Wiggins listed four places on the Region's questionnaire where he sought for work. The first being Rexel which delivers electrical supplies. During the period of April 1 to June 30, 2011, there are five employers listed on Wiggins' questionnaire, including Respondent. Wiggins testified he applied to Respondent numerous times while he was on strike. Wiggins testified that the jobs listed on the questionnaire do not include all of the jobs he applied to. Wiggins testified," I applied to way more jobs than that." Wiggins testified he listed what he could recall on the questionnaire, explaining he received it two and one half years after the fact, and that he felt pressured to get it in on time. Wiggins moved to Beltsville, Maryland in June 2011, when he received a loan from a family member and stayed with a family member. Wiggins testified he did not pay rent at the time because he could not afford to. Wiggins still resided in Beltsville at his cousin's home at the time of his testimony. Wiggins applied for a job with UPS before he returned to Maryland in June 2011, and he started working there around the beginning of November 2011

Wiggins testified after he returned to the DC area, he was looking for jobs in the D.C. area. However, he went on a job interview in Georgia for McLane in February 2011, but he did not receive the job. Wiggins testified for his Monster.com search he was using the D.C., Maryland, and Virginia area. Wiggins testified he did not limit the search to specific parts of Maryland and Virginia. He testified he got access to McLane in Georgia job through his search on Indeed.

Wiggins testified that he also searched for work by word of mouth speaking to different coworkers on the strike line, friends and family members. He testified his uncle works for UPS. He testified that was how he thought about going to UPS because you have to work in the warehouse there before you are able to be a driver, if a position is available. Wiggins testified that when he was in Emporia, Virginia, he applied to 15 to 20 jobs from family referrals.

Wiggins stopped working at S. Freedman on December 5, 2010. He started working at UPS in November 2011. Wiggins testified that when he returned to Maryland in June 2011, he signed up with Randstad Staffing Agency, and they placed him in a warehouse. He testified he was working for Randstad at the same time he worked for UPS, and that he was working day and night. He testified he was working part time in the warehouse for UPS and that he never received a full time position at UPS. Wiggins back pay period ended April 8, 2012. Wiggins testified, at the hearing, that he worked for Randstad during the backpay period. He testified they sent him to a medical facility warehouse in Savage, Maryland where he was pulling orders. He testified this was a five day a week job, which lasted 6 to 8 weeks. Wiggins testified at the hearing that he also worked for Aerotek Staffing prior to April 2012 at a cold storage warehouse in Savage, Maryland.

Wiggins questionnaire returned to the Region around March 2013, states he was working for UPS from November 18, 2011 to September 2012. It states he worked for Randstad from April 20 to May 6, 2012, and again from August 26 to November 30, 2012. It states he worked for Aerotek Staffing from July 15 to August 15, 2012. Wiggins Social Security records show he earned $1,075.94 for UPS in 2011; and $5,708.67 in 2012. Wiggins Maryland DLLR records show he worked for UPS in the fourth quarter of 2011; and during the first three quarters of 2012. Wiggins Social Security records only show earnings from Randstad in 2012 in the amount of $5,042.07; and his Maryland DLLR records show he worked there from the second to fourth quarters in 2012. Wiggins Social Security records only show he worked for

Aerotek in 2012, with earnings in the amount of $574.56; and his Maryland DLLR records only show he worked there in the third quarter of 2012.

Respondent contends that Wiggins backpay should be forfeited because Wiggins willfully concealed interim earnings which were revealed during his testimony at the hearing. Wiggins testified at the hearing in 2014 about events that took place in 2011. He volunteered at the hearing that he worked for Aerotek and Randstad in 2011, although he reported that he did not work for those employers until 2012 outside his backpay period in his questionnaire which was tendered to the Region around March 2013. Wiggins memory at the hearing was admittedly vague about certain events occurring years earlier, and because he volunteered that he worked for those employers in 2011 at the hearing, I do not find that he intentionally concealed his employment with them as Respondent contends. Moreover, Wiggins Social Security reports and Maryland government records confirm the questionnaire that Wiggins filed with the Region that he did not actually work for either of those employers until 2012 as he reported in questionnaire. In fact, the questionnaire was fairly specific as to the times he worked for those employers, and since it was confirmed by government records I find it is more accurate than what Wiggins recalled at a later date at the hearing. Accordingly, I find the record establishes that Wiggins did not willfully conceal interim employment and he only worked for Aerotek and Randstad outside of his backpay period. Therefore, I find his backpay claim as reflected by the amended compliance specification should not be reduced based on this argument and I reject Respondent's defense.

Respondent also argues that Wiggins forfeited backpay when he moved to Emporia, Virginia from December 2010 to June 2011, since Wiggins admitted there was not a good job market in that area. I also reject this argument. When he moved near Emporia, Wiggins lived with his mother. However, he credibly testified he did not move there for family reasons, but rather he was strapped for cash from lack of work thereby providing him with no alternative place to live. Moreover, while the Emporia job market was low, Wiggins did not limit his job search to Emporia but also looked for work in Richmond and St. Petersburg which by their size had a bigger job market, and he continued his internet search for work while he was in Emporia for jobs outside of that region including the D.C. metro area. So, I do not find that Wiggins absented himself from Prince Georges County out of choice, or that it impeded his job search in a way to justify Respondent's argument, which I reject.

I sum, I find Wiggins made a reasonable search for work during his backpay period which resulted in his obtaining some interim employment during that time. I reject Respondent's defenses and find he is entitled to backpay as provided for in the compliance specification as amended, as set forth in GC Exh. 3.

b. Horace Griffin, Jr.

Griffin was born in 1961, and has a high school education. Griffin's backpay period ended June 10, 2012. He collected unemployment benefits from July 3, 2010 to December 31, 2011. He was hired by Respondent in 1994. Thus, at the start of the strike Griffin was 49 years old, had a high school education, and had been working for Respondent for about 16 years.

At the time of his testimony Griffin had been recalled by Respondent on June 12, 2012, and was employed by Respondent. Griffin testified when he first started at Respondent he was in utility. He switched to a position in the warehouse about a year and a half after he began working there. As a utility person he labeled boxes and bottles, and filled bottles with product. As a warehouseman he was a forklift operator and he pulled orders. He testified he has a

license to operate a forklift and he has had that license close to 18 years with a break in time because there was no class to renew it. Griffin testified his forklift license had expired at the time he went out on strike, but he was operating a forklift long before he went on strike. Griffin testified Respondent gave the class for which he obtained his license. Prior to working for Respondent in 1994, Griffin worked for a period of time as a driver, although he did not have a CDL license. Griffin testified he has not had a regular driver's license since around 1986 or 87. Griffin testified that during the backpay period he traveled by public transportation. He testified he currently commutes to work by public transportation.

On the Region's questionnaire for the period of July to September 2010, Griffin checked the strike duty box as being unable to work. However, Griffin testified he was able to work. He testified, "That was a mistake because I didn't quite understand it." Despite checking the strike duty box Griffin listed seven employers during the period of July 5 to September 22, 2010 from which he sought work. Griffin listed multiple inquiries per quarter as reported by the compliance officer and his questionnaire through December 2011.

Griffin testified he did not work for the 2 years he was on strike. Griffin testified he was looking and applying to places but he was not getting any response. Griffin testified the only places he did not write down on the Region's questionnaire were repeated contacts. Griffin testified he heard the Union had a hiring hall and he did not apply there. Griffin testified there was a fee at the hiring hall and he did not pay the fee. Griffin testified he did not apply there because he did not have a forklift license and he heard the hiring hall was dealing with forklifts so there was no need for him to apply. He testified a couple of friends went to the hiring hall and were not hired so there were no jobs.

Griffin testified he has a computer but he does not use it as he is not computer inclined. Griffin testified he found out about jobs by going to the jobs, or asking friends or someone who worked at a place. Griffin testified he used the Washington Post. He testified he checked the Post every day or every other day looking at the classified section for labor or maintenance jobs stating that is what he feels comfortable with and is what he can do.

Griffin testified he talked to someone who worked at Dollar Tree Store during the backpay period several times seeking employment. He testified he spoke to them three times every two weeks or so. He asked if they were hiring or when they thought they would be hiring. Griffin estimated the last conversation with someone from Dollar Tree was around a month before he was called back to work at Respondent. Griffin testified that during the backpay period he had a conversation with someone working at a place called Cameron's. Griffin testified that he had the same conversation with people at Cameron's as he did at other places. He testified he would go about a job, and ask if they were hiring now or at any time.

In his questionnaire for the quarter January 1 through March 31, 2012, Griffin only listed that he had applied to three employers all in January. However, Griffin testified he applied to employers he had previously applied to during that period but did not list them. Griffin testified he did not list those on the questionnaire because they were repeated places. Griffin testified that during this period he applied to Wal-Mart and Forman Mills, but he did not list them. Concerning the period of February 2012 until he returned to work in June 2012, when asked if he looked for work during that time, Griffin testified, "Yes. I wasn't motivated like I was at the very beginning because I just -- basically I'm more going to give up, you know, because wasn't nothing happening. And I just put it in and then nothing comes out." "I just -- about ready to cash out basically. I was going to resign. But I gave it a little more time, and then I got called back." Griffin testified that during that period he went to places he previously went to including

Wal-Mart, Save-A-Lot, and Shoppers. He testified there were no other places he could remember. It was just those three places. He testified he went to those places several times, each around four times during the five month period. Griffin testified that when he went to places, he just talked to someone in the store, and that he did not ask for an application. Griffin testified that from the whole time he was on strike he only filed "maybe one or two" applications. He testified it was mostly talking to individuals at the locations.

In *St. George Warehouse,* 351 NLRB 961, 963 (2007), it was stated that:

> Longstanding remedial principles establish that backpay is not available to a discriminatee who has failed to seek interim employment and thus incurred a willful loss of earnings. See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941); *NLRB v. Mastro Plastics Corp.*, 354 F.2d at 175.[FN10] In this regard, the NLRB Casehandling Manual (Part Three) Compliance Section 10558.1 (2007) provides, in pertinent part:
>
> > A discriminatee must make reasonable efforts during the backpay period to seek and to hold interim employment. This is known as the discriminatee's obligation to mitigate. A discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate….
>
> In determining the amount of backpay due, the Board tolls backpay during any portion of the backpay period in which a discriminatee failed to mitigate. See id.

Respondent contends that Griffin did not make an adequate search throughout the backpay period. I find that Respondent's assertion is not justified. Griffin, at the time the strike began was 49 years old with a high school education. He had no proven usable computer skills, and he had spent the past 16 years prior to the strike working for Respondent. He did not have a driver's license and was limited in his search to the use of public transportation. He testified he reviewed the Washington Post classifieds to aide his search and his questionnaire reveals that he made multiple job inquiries at locations appropriate for his skills and education level. This is supported by the fact that he applied for and qualified for the receipt of state unemployment benefits for the period of July 3, 2010 to December 31, 2011. In January 2012, he listed three employers as part of his job search and a fourth employer was picked up by the compliance officer in her summary.

However, Griffin failed to list any employers in his questionnaire from February through June 10, 2012. He admitted he was frustrated in his search at that time, and I did not find his testimony convincing that he did not list employers that he applied to during that period that he had previously listed in his questionnaire, nor his claim that he went to three employers he named during his testimony around four times each during that period. In this regard, he had previously listed repeat employers more than once in his questionnaire, but gave no explanation for his failure to do so during February through June 10, 2012. I find that Griffin ceased actively applying for work beginning in the period of February 2012 through his reinstatement with Respondent.

As testified by Keough, backpay is calculated on a quarterly basis. Griffin's questionnaire shows he contacted three employers in the first quarter of 2012, and the Keough's records demonstrate the he possibly contacted a fourth employer during this quarter. Given the fact that Griffin's backpay period ran from July 6, 2010, I am not willing to disqualify Griffin from backpay for the first quarter of 2012, since he did made search efforts during that quarter, and it is reasonable given the length of his backpay period with no success that his efforts tailed off during that quarter. On the other hand, I find that Griffin and the General

Counsel have not demonstrated he continued his search for work into the second quarter of 2012, and therefore I find that he is not entitled backpay for that period. Based on the forgoing, I do not find that Griffin conducted a reasonable search for work for the second quarter of 2012, and I am denying the amended compliance specification's claims for him for that quarter only. I find Griffin is entitled to backpay as set forth in the amended compliance specification as detailed in GC Exh. 3 for the period of the third quarter in 2010 to and including the first quarter of 2012.

c. Adalberto Mendez

Mendez was born in 1981 and has a high school education. He lived in Hyattsville, Maryland during the course of his backpay period. He last had a driver's license in 2001. He never had a CDL license. Mendez began working for Respondent in 2007, started out as a forklift driver, and he was working for Respondent as a forklift driver on the night shift at the time of the hearing. Mendez backpay period ran from July 6, 2010 until November 12, 2012, when he was reinstated by Respondent. Mendez prior employers included: Turbo Haul where he was a navigator and assistant driver; and BMA, Inc. where he worked in shipping and receiving and as a forklift driver. Mendez was in the Marines from 1999 to 2003 where he worked a forklift in a warehouse. He testified that practically all of his jobs were in a warehouse. Mendez testified that as a warehouse worker, he picks orders and loads trucks. Mendez operates a forklift and a ride on jack. Mendez testified he rode a bus to commute to Respondent and his wife picked him up at night. Mendez testified it takes him two hours to commute to Respondent by bus, and it is a 40 minute drive.

Mendez received unemployment from July 3, 2010 until December 31, 2011. Mendez testified he had to look for work because unemployment required him to look a minimum of three times a week, and he submitted at least three applications a week. When asked if it mattered what type of job he applied for he testified, "I needed work. I had to change my career like you said. I needed something. I mean, I mean I had to look for whatever was available." Mendez testified he had to telecert to the unemployment office on a weekly basis that he was available for work and that he had applied for work that week. Mendez testified he did not have to tell unemployment where he applied.

Mendez identified the Region's questionnaire after having his memory refreshed. Mendez failed to list any employers that he contacted during the backpay period for the quarter July 1 through September 30, 2010, in the Region's questionnaire. Keough testified that Mendez' search for work in the third quarter of 2010 was not sufficient, according to the Board standards. She testified that he could not come up with a single contact that he made during that quarter, so the Region tolled his backpay for that quarter.

Beginning with the quarter October 1 through December 31, 2010, Mendez began checking the strike duty box on the Region's questionnaire. However, he listed no dates for which he was unable to work in that section of the questionnaire. Mendez credibly testified, "I never was unable to work. I was always able to work." He testified he checked the strike duty box but that, "I must have misread the question." The questionnaire he supplied reveals he was in fact searching for work during the quarters where the strike duty box was checked. When questioned about his search for work for the quarter October 1 through December 31, 2010, Mendez testified the list on the questionnaire included restaurants. There were nine contacts listed, which were enough to fill up the supplied page in the Region's questionnaire with all reported dates of contact listed in November 2010.

For the period of January 1 through March 31, 2011, the questionnaire showed four of the nine employment contacts were restaurants located in the same mall. The remaining contacts were other establishments in the mall such as Macy's and Old Navy. Mendez testified he went to the mall near his home and handed in applications to the listed places. He initially testified these were all the places he applied to. All nine places reported in Mendez' questionnaire in this quarter were listed to have been contacted on one of three dates in January. For the quarter April 1 through June 30, 2011, Mendez again listed nine places he applied to, and the reported dates were only in the April. They were all stores or restaurants in what Mendez labeled as the Prince Georges Mall. Mendez testified this was his job search from what he could remember and all the places listed were in the same mall as the places he listed in the prior quarter.

For the quarter July 1 through September 20, 2011, Mendez listed nine places in the questionnaire where he sought employment all with a reported July contact date. One of the places he applied to was Burger King and he testified he applied to flip burgers. Mendez testified that he had flipped burgers before while working in the mess hall for the Marines. Mendez also listed Kentucky Fried stating he was applying to sell chicken. He testified he was applying for work but, "They didn't have no work at the time." When asked if he looked for any jobs in August or September, 2011, Mendez replied, "I don't remember, sir." However, Mendez also testified he applied to three jobs a week in August and September, but he did not list them on the questionnaire as the jobs he listed were the only ones he could remember at that time. When asked if he was saying he applied for other jobs during that time, Mendez testified, " Of course. Yes, sir. I don't remember."

For the period of October 1 through December 31, 2011, Mendez listed nine stores all in a mall Bethesda, Maryland. He had three different dates recorded all in November for visiting that mall. Included in the places he applied was Kay Jewelers, although he admitted he had no experience selling jewelry. He testified from what he could remember he went to that mall to apply for jobs.

For the period January 1 through March 31, 2012, Mendez listed nine places on the questionnaire all applied to in January 2012, some located in Maryland and some in Washington D.C. Mendez testified he stopped receiving unemployment compensation around December 2011. For the period of April 1 to June 30, 2012, Mendez listed nine locations on his questionnaire most of which were in Hyattsville, Maryland with inquiry dates beginning on April 11 and ending on May 2, 2012. Places Mendez listed on the questionnaire included Marshall's which was located near Mendez' home. He also applied to a gentleman's club hoping to get a job as a bouncer. During the period of July 1 through September 30, 2012, Mendez listed nine potential employers on his questionnaire all reportedly at the same address in Arlington, Virginia for which he stated in the questionnaire that he applied to all on July 13, 2012. He testified all of the places were in the same mall. He testified for July 1 to September 30, if he remembered he looked for jobs only one day. The jobs included a Gap store, a Kay Jewelers, a hat store, a game store, another clothing store. Mendez returned to Respondent in November 2012. He listed nine jobs that he applied to in his questionnaire all on October 10, 2012, at a mall in Wheaton, Maryland. Mendez testified he applied to other places in October and November on other days, but these were the jobs he remembered. Mendez testified that he thought he was at the mall on October 10, but that he did not remember the exact date.

Concerning his responses on the questionnaire, Mendez testified he was not just looking for jobs at malls that he "was looking for jobs everywhere. Friend's warehouses. I was looking other places, but these were the only ones I could kind of remember I mean. It

happened a long time ago. I just got this a little while ago. This is what I could remember." Mendez testified he used to work for Turbo Haul and Alex Aparicio was a manager there. Turbo Haul is a bulk trash pickup company. Mendez testified he spoke to Aparicio about once a month or every other month during the period of October 2010 through November 2012 asking if he had any work for Mendez. Mendez testified he never submitted an application at Turbo Haul.

Mendez testified Jaime Chavez is a friend who told Mendez about a steamfitter apprenticeship program for Local 602. Mendez testified he took the test two years in a row to join the program. Mendez testified he thought he spoke to Chavez about the apprenticeship program before the start of the strike. Mendez testified he thought he took the first test in December before he went on strike. The test included algebra and some measurements. Mendez testified he did not pass the test the first time he took it. He testified he passed the test the second time he took it, which was while he was on strike but he still did not get into the program. Mendez testified he studied for a couple of weeks before taking the test. He thought he took the second test around December 2010.

Mendez testified his wife works at furniture rental place called Select Rentals and Mendez asked her if they had any openings for a driver. He testified they have drivers, and a warehouse, and they also put up tents at the mall in D.C. Mendez testified he was asking her about a job for two to three times a week for three years. Mendez testified he never filed an application with Select Rental, rather he just asked his wife, an accountant there, if they had openings. Mendez estimated that he talked to his brother Eric Mendez about a job on a weekly basis during the backpay period. He testified his brother works at a General Electric warehouse in Laurel. He testified he also talked with a construction company in Laurel about once a month during the backpay period soliciting work. Mendez testified he also applied for forklift jobs during the backpay period at some warehouses in Hyattsville and some on Route 1, the names of which he could not recall.

Mendez testified that the Union had a hiring hall. He testified he checked in with them to see if they were posting jobs. Mendez estimated this was around two years prior to his testimony, which took place in January 2014. Mendez testified he took a forklift class there. He testified the class was actually at the convention center. He testified you had to call in every morning which he did. He testified you call in and if they have work they will let you know where to go. Mendez testified he filled out paper work for this process. Mendez testified he did not recall the year but he thought he worked an Army trade show for about 20 hours of work and another show for the Marine Corps Marathon. The compliance officer's summary for Mendez showed he worked two trade shows in November 2012.

As stated in *St. George Warehouse,* 353 NLRB 497 (2008), a discriminatee, to be entitled to backpay must make reasonable efforts to secure interim employment. Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent. A discriminatee is held only to a reasonable rather than to the highest standard of diligence. The Board has stated that registration with a state unemployment office is prima facie evidence of a reasonable search for employment. The fact that a discriminatee is limited to search to places he could travel to by public transportation or by foot is reasonable and understandable. It was stated that the Board has recognized that the individual circumstances of the discriminate such as limited transportation must be taken into consideration in determining whether he has exercised reasonable diligence when searching for interim work. The fact that a discriminate commuted to a respondent by public transportation impacts on his ability to obtain comparable work and his search must be evaluated on that basis. Checking with friends is a valid part of a

discriminatee's job search. As was stated in *United States Can Co.,* 328 NLRB 334, 337 (1999), enfd. 254 F.3d 626 (7th Cir. 2001), an employer does not satisfy its burden showing that no mitigation took place because the claimant was unsuccessful in obtaining interim employment, or by showing the claimant failed to follow certain practices in his job search such as reading and responding to job advertisements in newspapers. Moreover, poor recall as to the specifics of a job search years later can be readily understandable and does not automatically disqualify a discriminatee from receiving backpay.

Here, Mendez had a high school education, did not have a driver's license, and did not use a computer. He commuted to Respondent by public transportation. Mendez applied for and received unemployment from July 6, 2010 to December 31, 2011. He credibly testified that is was his understanding that he had to make three job inquiries a week, and report to unemployment on a weekly basis in order to maintain his benefits. Thus, he did not receive the Region's questionnaire, according to Keough until around March 2013, it is understandable that he had limited recall concerning his job contacts by the time he received the questionnaire. Yet, he filled in the questionnaire for every quarter but the first with nine jobs that he had applied to, which was all the room provided for in the questionnaire page. Given the fact that he did not drive, only had a high school education, and did not have a computer, I find it was reasonable for him to search for work at restaurants, and retail establishments in area malls where he could inquire at multi-establishments with one trip. However, during the backpay period, he also credibly testified he sought work by applying to some warehouses and described where they were located. He sought work through the Union as a fork lift operator, took and passed a Steamfitter's apprentice exam which required study, contacted a prior employer on a regular basis seeking work, and contacted family including a brother who worked in a warehouse seeking work on a regular basis.

While Respondent argues that he should not be credited that he asked his wife about a job as a driver when he did not have a license, his application with Respondent as per Respondent's records had him seeking work as a driver with Respondent although he did not have a license at that time. I do not find it to be unbelievable that he sought a driver job at the place his wife worked with the idea of obtaining a license if offered a position. Regardless, his testimony reveals he made other contacts during the backpay for warehouse work and for other work appropriate for his skill, education, lack of computer skills, and lack of a driver's license, and I find he is entitled to full backpay as computed in the compliance specification as amended and set forth in GC Exh. 3. Similarly, Respondent's argument that Mendez never applied for a Steamfitter's position fails, as he testified he passed the exam but was not admitted to the program. Finally, contacting his prior employer without submitting an application is not the grave sin Respondent purports it to be. There was no evidence that in these conversations Mendez was told there was work available or that an application would help his cause. The repeated contacts with his prior supervisor were sufficient to inform that he was interested in employment if a job was available. As to his interim earnings, Mendez testified he worked two trade shows and the compliance officer was aware of this in her calculations of his backpay. I do not find Respondent has established the compliance officer's calculations were incorrect.

d. Robert Brice

Brice was employed by Respondent at the time of his testimony. His job classification is utility where he either goes out on trucks or does maintenance around the facility. He has been working for Respondent since 2008. Prior to Respondent, Brice worked for Snow Valley where he pulled orders and made deliveries in a warehouse. Brice backpay period was July 6, 2010 to February 5, 2012. Brice collected unemployment from July 3, 2010 until January

21, 2012. Brice was born in 1970 making him around 40 years old at the time of the strike. He has a high school education and a driver's license. Brice does not operate a forklift for Respondent, but he had done so for his prior employer. He testified he was available to work the entire backpay period. Brice testified he does not have very good computer skills. Concerning his receipt of unemployment benefits during the strike, Brice testified he had to show them he was applying for jobs. Brice testified, "I can't remember exactly what the qualification was for how many jobs I had to look for." Brice testified he had to call into unemployment to confirm he was searching for work.

Brice consistently checked the strike duty box under the unable to work section throughout the Region's questionnaire. However, Brice testified, "I looked for a job but I was out on strike." When asked why he checked the strike duty box, Brice testified "I misunderstood the question actually." Despite his checking the strike duty box, Brice also listed employers where he sought work throughout the questionnaire, and I have credited his testimony that he misunderstood the question as to why he checked the box.

On his questionnaire for the period of July 1 through September 30, 2010, Brice listed four places where he sought work, three of which were warehouses, and the fourth was Sam's Club. Two were listed in the month of July, one in August, and one in September. However, Brice testified when asked if from August to September he did not apply anywhere "No, I looked for jobs the whole time."

For the period October 1 through December 31, 2010, Brice again only wrote four jobs on his questionnaire, two with October dates, one in November and one in December. Two of the four jobs were listed as warehouses and a third was a storage place. In fact, Brice only listed four potential employers per quarter throughout his questionnaire. Brice testified he applied to more than four places for each quarter. Brice explained he only wrote down four places per quarter stating that he had to provide daycare for his children, since due to financial reasons he had to pull his children out of day care. Brice testified his family responsibilities placed a limit on his note taking concerning his job search. He testified he would call jobs and ask if they were hiring, and they would say no. Brice testified "I mean when I was going looking for jobs, I knew I had to keep a record of some jobs that I went to look for. So I would write down, you know, on a sheet of paper, and a lot of stuff got lost and misplaced."

Brice testified he would both call and go to places to find work. He testified he learned about a lot of the places from his phone using the internet. Brice testified he went on different job search sites, and warehouse sites on the internet. He testified you can just type in warehouses, and a lot of warehouse jobs come up. Brice testified, "There were a lot of jobs posted. But not a lot was hiring." Brice testified, "I would go on my phone, type in warehouse, and then jobs would come up where they were hiring for warehouses or where they were supposed to be hiring for warehouses. Whether I was qualified or not, I don't know." Brice testified that he applied to some of these jobs stating he called the ones further away because "I didn't have money for my car to drive out certain places all the time. So, yes, I would call and ask them if they were hiring. A lot of them say no." Brice testified, "I would ask if they were hiring, and they would be asking where I be from, what would I be applying for, and I would be like either a driver or maintenance or warehouse. And then sometimes the lady was like, no, we're not hiring, and the ones I did apply for, they never returned my call." Brice testified he did not have a CDL, and he was applying to drive a commercial van. He testified when he drove for Snow Valley, he drove a commercial van. Concerning his internet search, Brice testified he typed in warehouse jobs, and there would be a listing of area warehouses. Brice testified, "Whether they're hiring or not, I don't know, but I would call them looking for employment."

Brice testified the ones he kept a record of he listed on his questionnaire. Brice testified that during his backpay period he was doing online searches for work three to five times a week.

Brice lives in Upper Marlboro. While Brice questionnaire does not list a job in Upper Marlboro until October 2011, Brice testified that was not true that he just did not write them down. Brice testified he applied for a lot of jobs in Upper Marlboro. Brice testified, "I just would go and show up there and ask them if they were hiring." Brice named places where he applied in Upper Marlboro to include: Amstel Light; Foot Locker, Giant, the Highway Administration, and a lot of little places. Brice testified he applied, "Everywhere, everywhere and anywhere I could." When Brice was asked why he did not list these places on his questionnaire, he testified, "It's not that I didn't remember. I guess I just didn't put them down." "I didn't know I had to put a certain amount down." Brice testified he submitted an application to Foot Locker, although they were not hiring. Brice testified that not too many places that he went to were hiring, and the ones that were you needed a CDL to be a driver. Brice testified he went to Amstel Light around July or August 2010 and filled out an application. He received a letter that they were not hiring.

Brice testified that, some months into the strike, he talked to Webber about whether there were Teamster represented places that were hiring. Brice testified Webber told him there was "like a wait chain or something that you had to go through." Brice testified Green Decking is a company that installs decking and fences. He testified that he spoke to Steve Green several times during the backpay period. Brice asked Green if he had any projects coming up, and needed help, but at that time business was slow. Brice testified Green said he would get back to Brice if a job came up. Brice estimated these conversations took place around July or August in 2010 or 2011. Brice did not record these conversations in his questionnaire because he considered Green to be a friend and therefore did not feel the conversations were part of his formal job search.

Brice testified the Highway Administration is in Upper Marlboro. He testified when he contacted them they were on a hiring freeze, and they would tell him to call back every 3 to 4 months to see if the freeze had lifted. Brice testified he contacted the Highway Administration several times. He thought the first time was before the strike started, and then after the strike began. Brice went there two or three times. Brice testified he called the Highway Administration about every 3 months or so, from the beginning of the strike with the last time shortly after he went back to work for Respondent.

Brice estimated that, during his backpay period, he visited the Forestville Mall once every 2 or 3 months, and inquired at stores to see if they were hiring. Brice testified he checked with about seven stores per visit. At the mall, Brice filled out applications at stores such as Foot Locker, Down Town, Locker Room, and Shoe City. Brice testified he went to Food Lion to shop, and he saw the manager on a regular basis and Brice would inquire if they were hiring. Brice estimated these conversations began around November 2010, and he continued to make these inquiries with the manager about four or five times a month. Brice also went to Wal-Mart during the backpay period in an effort to fill out an application, but their computer was down. Brice testified that, during the backpay period in 2010, he asked a friend who worked at a Wawa if they were hiring. Brice also inquired about a job with an Ace Hardware store, but he did not fill out an application because there were not hiring. He testified he filled out an application at a Shoppers during the backpay period but never received a response.

I have concluded Brice job search was sufficient to substantiate the Region's backpay claim as set forth in the amended compliance specification. Brice backpay period was July 6, 2010 to February 5, 2012, and he collected unemployment from July 3, 2010 until January 21,

2012. Thus, he received unemployment benefits through most of his backpay period. While Brice could not recall the specifics, he testified he called in to unemployment to confirm that he was searching for work and to show them he was applying for jobs. As set forth above, this creates a presumption that he was looking for work during the time he received unemployment. While Respondent contends there was something nefarious about Brice listing four jobs per quarter in the Region's questionnaire, I do not find this to be unusual or lacking in credibility on the part of Brice who I have found to have testified in a credible way.

First, Brice, who only has a high school education, did not receive the Region's questionnaire until over a year after his backpay period ended. While he testified he knew he had to document his search, which was why he kept some records, there was no showing he was instructed on how detailed the documentation need be, until over a year after the fact. Brice testified a lot of his search was performed by internet searches on his phone. The places he listed in his questionnaire included a large percentage of warehouse and similar employment. He credibly explained that, during the backpay period, he had a lot of additional childcare responsibilities due to his lack of funds, which was a direct result of Respondent's unfair labor practices, as a reason he did not keep more detailed information concerning his job search. I do not find merit to Respondent's assertion that Brice should have done a search of the web histories on his phone to more completely document his search. First, Brice credibly testified he had limited computer skills, and there was no showing that Brice had the wherewithal to make such a search, or that the phone would have maintained such histories or for how long. I also do not find it unusual that Brice was able to supplement the information in the questionnaires pertaining to his job search with his testimony at the hearing. I think in this case, the questioning of Brice brought out more specifics of his search by allowing him, as a layperson, to better understand how to more completely report what actually occurred. Accordingly, I find Brice' job search, as he credibly described above, was a reasonable search under the Board's standards and was sufficient to justify his backpay as set forth in the amended compliance specification as set forth in GC Exh. 3.

e. Ronnie McFadden

McFadden's backpay period ran from July 6, 2010 to February 27, 2012. He collected unemployment from July 6, 2010 to February 10, 2012. McFadden was employed by Respondent at the time of his testimony and he began working there in 1994. He started for Respondent on the night shift at the warehouse and at the time of the hearing he was working day shift at the warehouse. Prior to working for Respondent, McFadden worked for Schwartz Brothers as a warehouseman, where he was eventually promoted to a supervisory position. McFadden was born in 1958, making him around 52 at the start of the backpay period. He has a high school diploma.

McFadden lived in the Hyattsville, Maryland vicinity during the backpay period. McFadden has a driver's license. McFadden has a forklift license which he received from Respondent. McFadden testified each company gives its own forklift exam so the license he obtained at Respondent was not transferrable to other companies. McFadden graduated high school in 1976 or 1977 and then he started working for Schwartz Brothers shortly thereafter. McFadden testified all his professional experience has been in warehousing. McFadden has been driving a forklift since the 1970's. McFadden testified he started off at Respondent as an assistant supervisor, then a foreman, and then a lead person. McFadden was a lead person

until the start of the strike, but he was not recalled by Respondent as a lead person.[17] McFadden had no interim earnings during the course of the strike.

McFadden testified unemployment had a requirement that he had to apply for work every week in order to qualify for benefits. McFadden estimated that unemployment required that he apply to three or four jobs per week. McFadden testified he had to list the names of the employers he applied to on the unemployment website. He testified he applied to four places a week during the backpay period and he reported those to unemployment. He testified that some of the job listings he filed with unemployment he recorded on a separate sheet of paper and some he did not. He testified he did not write them all down due to time constraints. McFadden testified he provided the list of jobs he wrote down on the Region's questionnaire.

McFadden testified he received the Region's questionnaire in 2013. McFadden filled the nine item employer contact page for each quarter of his questionnaire with the names of nine employers, listing the date of contact, and the name and address for the employer contacted. For the period of July 1, 2010, through September 30, 2010, for the employers he listed on the questionnaire McFadden testified he submitted applications on line. He testified that he reported these nine applications to the unemployment agency. McFadden listed nine items for the period October 1 through December 31, 2010. McFadden testified the nine items were jobs he looked for on the internet and he filed an online application for them.

For the period of January 1 through March 31, 2011 there are again nine items listed on the questionnaire. The third item listed was called Afghan Bakery to which McFadden testified he was applying to be a supervisor at the bakery. He testified he had never worked in a bakery. The next item listed is Fashion Accessories, to which he also testified he was applying to be a supervisor. McFadden testified he has been a warehouse supervisor with employees under him so he was applying for supervisory positions. McFadden testified "I applied the supervisor position at them places." He testified Fashion Accessories does not have a warehouse it is a retail store. McFadden did not have any retail experience. McFadden testified the next one D.C. Water and Sewer Authority, he was also applying for a supervisory position. He testified, "I'm going to supervise employees. I have a supervisor qualification." He testified he had never worked in sewage. There is also a Mexican Grill listed to which McFadden testified he applied for a supervisory position. McFadden testified he has cooking experience, but has never supervised workers who were cooking. There is another restaurant listed in this quarter to which McFadden testified he had never worked in a restaurant. McFadden explained, "I'm a pretty good cook. I do different things. I do mine out of books and stuff. And I'm a very good cook, an excellent cook." He testified, "You don't need professional cooking experience to be a cook, ma'am." McFadden admitted he had not worked in the industries listed for this quarter. He testified he had supervisory experience when he worked for Schwartz Brothers. When asked why he thought his supervisory experience would translate to other entities, McFadden testified, "during that time I was trying to find a job so I could take care of my family and stuff. And most issues, anywhere I could apply and any one will accept me, I would take it, during that time." McFadden testified he applied for some supervisor jobs because they were advertising for a supervisor positions, and to him that related to how many employees the supervisor had under them that you are qualified to supervise, and since he had experience as a supervisor he applied.

[17] Counsel for the General Counsel stated McFadden's status on recall was not an issue in this proceeding.

For the period of April 1 through June 30, 2011, there are again nine items listed, while it is not listed on this page, McFadden testified Pepsi-Cola, was warehouse. The rest were not warehouses. As to the rest, McFadden testified they all, except one, had an opening for a supervisory position and he applied for a supervisory position at each one. He testified he had no specific experience in the industry as a supervisor. During this period, McFadden listed Bowie Police Station, where he testified he was not applying for a supervisory position. He testified that was a position where he would be working the phone for emergency calls. McFadden testified in that job they were training someone to be a call person.

Concerning the period July 1 through September 30, 2011, one item listed was Adidas North America. McFadden testified he did not have any experience with shoes or any retail experience. As to the other items listed, McFadden testified he could not recall what Zeds, Shine Masters, Clean and Safe, Seven Plus, or Cash for Washington do. He testified this was so long ago. As to Seven Plus, McFadden testified it just popped up on the internet. "I applied for a job." For the quarter October 1 through December 31, 2011, McFadden testified he did not know what Soft Brush Studio does. He testified, "All I did, if they had an ad on the internet, then I applied for the job." He testified he did not apply for supervisory positions for all these that "I just applied for -- some jobs I applied for just to see if I can get the job. McFadden had difficulty recalling the specifics of the listed employers. When asked if any were warehouses, McFadden testified, "I just went online. I just applied on there. It got to a point that I went online applying for jobs just to see if I can get anything at the at this time." McFadden testified that to his knowledge none of the nine jobs listed were warehouse jobs. He testified it could have been but he did not recall.

McFadden testified that when he went on strike at the beginning he was looking for some warehouse jobs. McFadden, upon reviewing the list of jobs for the quarter July 1 to September 30, 2010, at first, identified five of the nine jobs as being warehouse jobs. For the quarter October 1 through December 31, 2010, he identified two out of the nine jobs listed as being warehouse jobs. However, when he was later asked the same question he testified that only one job in the July 1 to September 30, 2010, quarter was a warehouse job, and that there were no warehouse jobs listed in the October 1 through December 31, 2010, quarter. In the quarter July 1 through September 30, 2010, as listed on his questionnaire, the employers included: Acme Movers & Storage, Washington Archives, Allstate Professional Movers, Acorn Self Storage, and Mac Arthur Liquors Warehouse.

McFadden, upon clarification of the question, testified as to the nine jobs he listed for the quarter January 1, 2011 to March 31, 2011, that eight were not warehouse jobs, and one he could not recall. For the period April 1 through June 30, 2011, McFadden testified that eight were not warehouse jobs, and that one was. For the period July 1 to September 30, 2011, McFadden testified that none of the nine jobs listed were warehouse jobs. For the period October 1 through December 31, 2011, and January 1, 2012 to March 31, 2012, none of the jobs listed were warehouse jobs.

McFadden testified all of the places he listed in the Region's questionnaire he submitted applications to them on line. He testified he did not receive an interview from any of the places he listed in the questionnaire, and he did not receive an interview for the time he was out work. McFadden testified he received no response from any of the companies, and when asked if he was certain that his applications went through he responded, "I am not a genius with a computer, …." McFadden applied for jobs on line using a website called Hotjobs.com. McFadden went to that site, and then he filled out job applications on line. McFadden testified that in July 2010 and throughout the backpay period he went on the site at least three to four

times a week. McFadden testified he has a computer and Smartphone which provide him with internet access. He testified he has no professional experience with computers or any training on their use. McFadden testified, "I still don't have a lot of experience with a computer." McFadden testified his son introduced him to the Hotjobs website, and his son told him what to fill out. McFadden testified, "I am not a genius with a computer. Because if you're going to ask me how did I look for a job on the computer, not experienced, but with my son's help –".

McFadden testified that in addition to the items listed in his questionnaire there were other places where he applied, such as going into a store and if he saw they were be hiring he would apply. He testified he did not list them in the Region's questionnaire because it was so long ago he forgot what stores he went to. McFadden testified the stores were located in Prince Georges County. He estimated he went to stores seeking work about 40 times during the backpay period, and if they had a hiring sign up he would go in and apply for the job.

McFadden testified that he read the classified job section in Washington Post every Sunday during the backpay period. He applied for jobs he qualified for, and even some he did not that he learned about from looking at the paper's classifieds. McFadden followed a similar process in looking and applying for jobs listed in the PG Gazette. McFadden testified there were jobs posted every Sunday in the Washington Post that he felt qualified for. He testified there were jobs posted every Wednesday in the Gazette for which he thought he was qualified which is why he applied. McFadden testified the jobs he applied to from the Post and Gazette were different from the ones he listed in his questionnaire. The jobs he listed in the questionnaire he found in Hotjobs.com

Respondent argues that despite having no culinary or sales experience, McFadden repeatedly contacted restaurants and retail establishments which were supposedly recruiting supervisors. Respondent cites *Big Three Industrial Gas,* 263 NLRB 1189, 1219 (1982), for the proposition that an employer is not obliged to subsidize a venture where a discriminatee voluntarily absences himself from the comparable labor market. The referenced page cite in *Big Three* refers to discriminatee Wylie, a millwright-helper, who did not register with the state unemployment agency and admittedly did not pursue job leads suggested by the union's representative. During the backpay period he took a low paying job as an equipment handler with a friend's band. He held this job for a year and one half and explained he was just doing something he enjoyed. The judge, as approved by the Board, found that Wylie's backpay was tolled in all quarters in which he willfully failed to engage in a good faith search for work for employment comparable to that which he performed for the respondent. There, an official for the state unemployment office testified there was a relative abundance of laborer, maintenance, and helper type jobs during Wylie's backpay period.

Here, Respondent argues that McFadden's claims that he conducted an online job are unsubstantiated, and that his testimony vacillated as to the nature of that search. Respondent argues his testimony that he applied to such places as Threads and Soft Brush Studios on the internet is nonsensical that he did not know what positions he was applying for. Respondent argues that McFadden utterly failed to search for jobs commensurate with positions he had held for the last 30 years, and that his backpay must be tolled in its entirety.

I do not find Respondent's arguments persuasive, in *Big Three Industrial* the cited discriminatee failed to register with the state unemployment agency, failed to follow direct referrals for work from his union representative, absented himself from the labor market for a year and one half to travel with a friend's band for very low wages because he enjoyed it, and

then left an area with plentiful jobs to an area with much lower job availability for personal reasons unrelated to his search for work.

With respect to McFadden, at the time of the strike he was in his 50's, had only a high school education, and spent his whole working career in a warehouse mainly operating a forklift. He had very few computer skills, in what has become a high tech society. He had worked for Respondent since 1994, a period of about 16 years at the time of the strike, and would have to explain why he was no longer employed there to any potential employer, or it would have created questions by reading his resume. Unlike the cited discriminatee in *Big Three,* he applied for and received unemployment benefits, and his testimony reveals he met the state's requirements in documenting his job search to that agency for benefits. While his testimony did vacillate in certain respects, I attribute this more to the passage of time rather than an intent to deceive. He credibly testified that he kept a partial record of the employers he contacted on line that he filed with the state, and that he recorded those on his questionnaire. The detail of the address, date of contact, and name of the company over about a two year period serves to confirm that he conducted the internet job search as he testified. I find the nature of his job search, of which Respondent complains was limited by his admittedly poor computer skills in developing better search inquiries, as well as a frustration in obtaining warehouse work as he testified. While he only listed one warehouse in the first quarter of his search there were also moving and storage companies listed which appear to be related work. Since, he was at a low skill and educational level at Respondent, I do not find that his applying to jobs in other fields with low skill levels removed him from applying for comparable work. The frustrating nature of his search was revealed by such testimony that he was looking for any place that would take him. His reliance on his supervisory experience to obtain work as a supervisor in other arenas was an attempt to market the skills he had. McFadden credibly testified his internet job search was through the aid of his son, and was augmented by pursuing classified ads in newspapers and by multiple direct visits to stores.

As set forth above, I do not find that Respondent has established that, during the relevant time period there was a robust labor market for someone at McFadden's age, skill and educational level. Rather, here Respondent unlawfully failed to recall a long term older employee, with a limited education and skill set, and those qualities defined the nature of his job search. I find that Respondent, not the employee should suffer the consequences of its actions, and I find McFadden is entitled to full backpay as set forth in the compliance specification, as amended and set forth in GC Exh. 3.[18]

f. Trevor Holder

At the time of his testimony, Holder was working for Respondent as a warehouse person. Holder's backpay period ran from July 6, 2010 to March 12, 2012. He collected unemployment from July 17, 2010 until March 3, 2012. Holder was born in 1966, and he graduated high school in Guyana. Holder began working for Respondent in 2003, and he became warehousemen there in 2009. Holder has only held two jobs since living in the United States, the first was with Track Auto where he was a fork lift operator and loaded trucks for about 12 years. The second was with Respondent. Holder lived in District Heights, Maryland

[18] Respondent did not articulate in its brief any reason why McFadden was not entitled to the night shift differential during the backpay period, and since he held a night shift position prior to the start of the strike, I have concluded as testified to by the compliance officer that he was entitled to the differential in his backpay calculation.

during the backpay period. Holder has a driver's license. As a warehouse person, he loads trucks, and is a forklift operator.

Holder filled out two NLRB questionnaires concerning his job search. He could not recall why he received two questionnaires, or which one he filled out first. In one questionnaire, which for purposes of reference I will label questionnaire A, for the period of July 1 to September 30, 2010, Holder stated he was unable to work because he "could not find a job." He listed five employers for his job search for that period, one of which was a staffing company. In the other questionnaire, referred to as questionnaire B, Holder listed no employers for his job search during that period. Holder testified the five jobs he listed in questionnaire A for the period July 1 through September 30, 2010, included all of the jobs he tried to get during that time, including jobs he may have seen in the newspaper.

In questionnaire A, for the period of October 1 through December 31, 2010, Holder again stated he was unable to work because he could not find a job.[19] Holder testified at the hearing he was able to work during all of the backpay quarters, but he "didn't get work." Holder testified he was looking for work. In questionnaire B for the quarter October 1 through December 31, 2010, Holder recorded three jobs for his job search, one a warehouse, and another at Cort Furniture. For the same period in questionnaire A, he had no jobs listed. Holder testified that during this period he reported to the state unemployment agency how he was looking for work. He initially testified that during this period he applied to three or four jobs a day, and when asked why he only listed three jobs on the questionnaire he answered, "I don't know." Holder testified the state unemployment agency sent him a book to record his job search, but he misplaced the book. Holder testified to receive unemployment he had to apply every two weeks. He then testified he applied for jobs "like three, about three a week, two a week." He then testified, he applied for, "a couple of jobs a week. At least I think it's three or four jobs, I can't remember." He testified he thought it was three or four jobs a week.

For the period of January 1 through March 31, 2011, in questionnaire B Holder listed two companies for his job search. In questionnaire B for the period of April 1 through June 30, 2011, Holder listed three jobs including Giant Food Warehouse. For this period in questionnaire A, Holder wrote, "I did not have extra cash to make copies at Staples so I only have copies for a few weeks. Most weeks I sent the original job search record without making any copies because I could not afford it. But I did try hard to find a job because we have five children." Holder testified unemployment sent him a document to submit to unemployment to document his job search. He testified he sent the original to unemployment, but did not make a copy for his records.

For the period July 1 through September 30, 2011, on questionnaire B, Holder listed three jobs. The job listing page for questionnaire A was blank. For the period October 1 through December 31, 2011, Holder listed eight employers as part of his search on questionnaire A. Holder testified he applied to the eight places listed during December 12 through 14, 2011. However, he testified he also applied to employers in October through November 2011, stating, "I apply, yeah. Different place I go to, different warehouses around my way." He testified he applied to a tile warehouse during that time period. He testified he did not make a written record of these jobs. Holder, as reflected in questionnaire A for this period applied to three different Lowes locations, for which he testified to do warehouse work.

[19] Holder made the same statement for every quarter in questionnaire A through the quarter ending in March 2012.

For the period January 1 through March 31, 2012, Holder listed four employers on questionnaire A, showing the contacts took place between January 10 and 13, 2012.

During the backpay period, Holder testified he reviewed the Washington Post on a weekly basis as part of his job search. He testified, "I go to look for job, look under word job, and they've got opening, call and see if they're hiring. I use my house phone. I don't have a computer." He testified he did not know how to use a computer. He testified he would look for jobs in the paper, and if there was nothing in the paper, he had his kids to "search on the Internet, and they will help me." Holder testified he had a one year old child, that he only had one car, and when his wife came home from work, she would take over the child care and he would go where they had an opening, including Giant and Safeway and "different places."

Holder testified that he talked to about eight or nine friends during the backpay period concerning his search for work. He testified "about every week, every weekends I talk to them and I ask them and I got to hear I need a job, and they would tell me, come up here, go there, and I would go but they're not hiring." Holder did not recall the places he went to as a result of those conversations. Holder was not employed during his backpay period, and he could not recall if he had any job interviews.

Holder was in his mid-40's during the backpay period. He had a high school education, which he obtained in another country. He did not have a cell phone, and he did not use a computer. He had a driver's license but his access to a vehicle was limited by his wife's work schedule, and his job search time was limited because of child care duties he had to assume due to loss of income.

Respondent argues Holder's testimony and assertions of a job search over all lack credibility because of the inconsistent questionnaires he provided to the Region, the paucity of employers listed for the search in those questionnaires, as well as certain admissions he purportedly made that certain employers listed on the questionnaires were the only employers he filed with unemployment. Respondent cites *Moran Printing, Inc.*, 330 NLRB 376, 381 (1990), where discriminatee Dixon was disqualified for backpay for certain inconsistencies in Dixon's presentation. However, with respect to Dixon, his testimonial inconsistency was only a factor included in several reasons for which the judge denied him backpay. The judge noted Dixon's testimony concerning his job search was contradictory between a deposition given at a court proceeding and an NLRB compliance proceeding two weeks later, and that both varied from a more detailed list concerning his job search that he had submitted to the NLRB. The judge found that he did not begin his job search until about nine months after his discharge. The judge noted that Dixon's admitted delay in seeking employment, failure to keep current in the union's out of work book, and his failure to call newspaper ads for the job he claimed to be seeking were among several factors, along with his unreliability as a witness, that established that he did not make a diligent search for work.

In the instant case, Keough's testimony reveals that the Region's questionnaire was not sent to the discriminatees until around March 2013, which was a full year after Holder was reinstated with Respondent. Keough also testified that discriminatees who returned questionnaires that raised questions were contacted and sent another questionnaire. While Holder could not recall the circumstances in which he received the second questionnaire it is likely the result of the process Keough described. The Region's delay in sending the discriminatees the questionnaires cannot fall upon the discriminatees, who had already been unlawfully denied reinstatement. Moreover, Respondent cannot be held harmless due to its desire for continued litigation, rather than offering the discriminatees immediate reinstatement as

required by the underlying decision here. Rather, there was no showing that until around March 2013, that Holder was informed by anyone that he had to keep additional records of his job search other than those for which he submitted to unemployment. Thus, while I do not overlook the inconsistencies in the two questionnaires, or the small amount of jobs listed, I do not find that sufficient to discredit Holder's testimony that he engaged in a consistent job search to meet what he perceived to be his bi-weekly reporting requirements to unemployment. Holder credibly testified that due to his extreme financial circumstances he did not keep copies of the filings he made with unemployment. In this regard, at the time he tendered those documents to unemployment he was given no reason to otherwise maintain copies.

Respondent also points to a couple of points in Holder's testimony where Respondent contends he admitted that the employers listed on the NLRB questionnaires for a given period were the only employers Holder submitted to unemployment. Yet, at one point in response to Respondent's questioning Holder testified that was not the case, that he was applying to multiple employers a week, yet Respondent persisted in this line of questioning. While Holder did state with more particularity that the five employers listed for the initial quarter in his backpay period were the only employers he filed with unemployment, I find his response there to be more of the same, and have credited his testimony that over the backpay period he was aware of a search requirement for unemployment, and that he engaged in a consistent enough search over the backpay period to meet those requirements.[20]

This conclusion is confirmed by the fact that Holder was able to recall, during his testimony, some of the employers he contacted for the Region's questionnaire for each quarter of the backpay period, and by his credible testimony that he read the Washington Post on a weekly basis and applied to job opportunities listed there as part of his job search, and well as by his credited testimony that he reached out to multiple friends in an effort to gain employment. Accordingly, I find Holder is entitled to the backpay amount as set forth in the amended backpay specification, as set forth in GC Exh. 3. Respondent submitted no evidence to establish that compliance specification was inaccurate concerning interim earnings by Holder.

g. John Smith

Smith was born in 1949, making him in his 60's during the course of the strike. Smith has a GED high school equivalency degree. He served in the military from 1969 to 1971. Smith lived in Hyattsville, Maryland during his backpay period. Smith has a driver's license. Smith was working for Respondent at the time of his testimony as a warehouse worker. He was hired by Respondent in 1994. At the warehouse, Smith operates a forklift, pulls merchandise and his primary responsibility is shipping things to customers in different parts of the country. Smith loads items but part of his responsibility is to select the best means to ship items such as FedEx or a commercial trucking company. Smith testified his work is different than the other warehouse people in that he pulls the order to be shipped, wraps it, weighs it, and then uses the computer to determine the most efficient, according to weight, way to ship it. He testified none of the other warehouse workers do this. Smith testified he is not a lead person. Smith worked

[20] Holder's testimony at the hearing did vacillate as to the frequency of his applications, at one point stating it was three or four jobs a day, and then changing it to between two to four jobs a week. I do not find this was part of an intent to deceive on Holder's part, rather it was attributed to poor recollection in 2014 as to events that took place over a 2 year period from 2010 to 2012. I have credited Holder that he was aware of a bi-weekly reporting requirement of his job search with the state unemployment agency, and he generated a sufficient job search throughout the backpay period to meet that requirement.

for a temporary staffing agency called America's Labor, prior to working at Respondent. The referrals there included construction, warehouse work and labor work. Smith's backpay period ran from July 6, 2010 to February 12, 2012. He collected unemployment benefits from July 3, 2010 to January 21, 2012, as reflected by the compliance officer's summary.

Smith testified that while he was on strike he had to inform the state unemployment agency of whether he was searching for work in order to qualify for benefits. Smith testified unemployment did not ask where he applied in his search for work, but rather he was just asked if he was looking. He testified there was a check mark he had to make on the computer on the state's website. Smith testified he had to check if he was or was not looking for work, but he did not have to report on the website where he looked. Smith could not recall whether he was asked on the website how many employers he sought work with.

Smith identified the questionnaire he received from the NLRB concerning his job search, and he thought he received it in 2013. For the quarter July 1 through September 30, 2010, Smith listed nine employers for his job search on the questionnaire, which he testified he applied to during the quarter. Included in the nine items listed for this quarter, Smith testified he applied to Sheraton Silver Spring on line, that he learned by talking to someone on the strike line that they were looking for busboys. Smith listed three jobs that he applied for in August 2010 on the questionnaire, but testified he was quite sure he applied to additional jobs in August, but he did not recall what they were. Smith testified that he listed the three on the questionnaire "Because I had these here wrote down." Smith testified he had not made a record of any of the other jobs he inquired about during that month.

For the quarter October 1 through December 31, 2010, Smith listed nine employers for his job search on the questionnaire. The fourth employer listed was S. Freedman and Sons. Smith testified he went there because a few of the drivers from the labor dispute were hired there, and he wanted to inquire if they were hiring warehousemen. For the period January 1 through March 31, 2011, Smith listed nine employers on his questionnaire. He testified he applied to the Washington Post as someone to insert advertisements and coupons in the newspapers. One of the employers listed was UPS Freight. Smith listed three jobs in January 2011, and when asked if there were other places he applied to that month, he testified, "Chances are, there are." When asked if he could recall what they were he testified, "Not back then, I don't. But knowing what my objective was --To find employment. I couldn't recall them off the top of my head."

Smith's questionnaire that was placed in evidence skipped the quarters April 1 through June 30, 2011, and July 1 through September 30, 2011, and Smith could not recall whether he received from, or submitted a questionnaire to the NLRB relating to those quarters. However, Smith identified a separate document in his handwriting which he testified he submitted to the NLRB listing 16 jobs running from February 3, 2011 to July 15, 2011. Smith testified he applied to the jobs listed, and that there were other jobs he applied to during this period. He testified he could not name the other jobs. It appeared from a date stamp on the list that Smith faxed this sheet of jobs to the Region on September 20, 2013. Smith testified he had the sheet faxed in to the Region's resident office, and that it was around the September 20, 2013, date recorded as the faxed date on the document. He testified he remembered these jobs at that time, "Because I had them wrote down. I would write them down, to be honest, as I felt like it." The timing of the September 20, 2013, fax can be presumed to be in relation to the trial in this case, the first day of which took place on September 30, 2013.

In Smith's questionnaire for the period October 1 through December 31, 2011, he listed eight employers, the last of which was Kay Jewelers to which he applied as a salesperson. Smith admitted he has no sales experience. Smith also applied as a house sitter for a home for troubled teenagers during this quarter. Smith's last entry in the questionnaire was dated November 2011. He returned to work at Respondent the first week of February 2012.

Smith testified that during the strike he applied to other companies the Union represents. He testified the Union operates a program where you have to pay a fee and you call in each day to work at different convention centers. Smith testified he enrolled in that program. Smith testified you get up early in the morning and call in around 4 or 5 a.m. and he was seeking work as a forklift operator. Smith testified he had to be available and they would contact him by phone if they had work for him. Smith testified he could not recall when he started the program, but he called every morning until he returned for work for Respondent. Smith later estimated it was around 6 to 9 months before he returned to work at Respondent that he began his daily calls to the Union for referrals. Smith testified when he called in to the Union for referrals he did not have a valid forklift operator's license so he was not given any work. Smith testified, "I never gave up, but I got on the list to take the forklift operator's exam. And before it came up, I got called back to work." Smith testified he had to sign up for the forklift operator's exam and once enough people were enrolled in the class they notified him of when and where the class would be. Smith estimated he initiated interest in the forklift operator's exam about 2 or 3 months before he was recalled to work at Respondent. He testified the cost of the class was covered by his initial payment to join the program.

Smith testified that, during his backpay period, he read the Washington Post 6 days a week and he reviewed the paper's classified job section. Smith also testified he has a computer with internet access. He testified he used a website called Jobs.com about once every 7 to 10 days as part of his job search. He testified he would check off what he was interested in and send them an online application then wait to hear back. He testified when he registered for the site, he would receive emails about jobs from the site and he would check his emails. Smith testified he used Monster.com and a Washington Post online site as part of his job search and those sites followed similar procedures. Smith testified he used Monster.com two or three times a month during the backpay period. He testified he would check to see what listings they had under warehouseman, and then apply for the ones he was interested in. Smith testified he used the Washington Post site two or three times a month. Smith testified his first choice on the sites was warehouseman, and his second choice would be anything that was labor intensive such as construction, janitorial work, and things such as a delivery driver. Smith testified he did not need any help performing his job search on the computer. Smith testified concerning Monster.com that there were more than 10 jobs that he found he was interested in, but he could not say if there were more than 20. Smith testified he received some emails from the Jobs.com site, but he could not say if it was more than 10 during the backpay period. Smith testified that a lot of the places concerning the emails wanted to charge him to get work, and that he did not submit application to those places. Smith testified he did submit applications to places he found on Monster.com but he could not recall the names of those places.

Respondent contends in its brief that the documents Smith supplied to the Region showed no job contacts during the months of August, September, December 2011, and January 2012. Respondent also questions Smith's assertion that he looked for additional jobs to the ones he listed, but did not feel like writing them down. Respondent takes issue with two of the jobs Smith applied to at the end of his backpay period, one as a jewelry sales person and another as a caregiver for troubled teenagers. Respondent questions the veracity of Smith's search stating it was done only to be sufficient to qualify for unemployment. Respondent

argues, "The only remotely credible portion of J. Smith's testimony concerned his usage of a dial in number the Union provided for job seekers." However, Respondent argues this evidence alone does not establish the reasonableness of an employee's search for interim employment. Respondent cites *Moran Printing,* 330 NLRB 376 fn. 2 (1999), where an employee as part of his search for work failed to sign the union's out of work book each month causing his name to be dropped further and further down the referral list. In fact, the Board noted the employee signed the book in January and did not sign again until May.

In the instant case, Smith credibly testified that towards the end of his back pay period Smith called into the Union's referral hall for which he had to pay a registration fee, on a daily basis for a period of 6 to 9 months at the hours of 4 or 5 a.m. in the hope of obtaining day work as a forklift operator. Despite his lack of success in his efforts, Smith signed up for the Union's fork lift exam to further his efforts to get forklift work, but was recalled to Respondent before taking the exam. Thus, the months at the end of his backpay period where he did not specifically name an employer were supplemented by Smith's efforts at the Union's hiring hall, as well his credible testimony concerning his efforts made through regularly reading the Post's classified ads as well as his independent efforts on the internet as to his job search. The fact that Smith did not record his job search efforts in as much detail as Respondent would require, or could not recall certain inquiries he made in 2010 to February 2012, during his testimony in 2014, does not serve as a basis to disqualify him from his backpay or otherwise suggest that his job search was not reasonable or in earnest.

The questionnaire Smith submitted to the Region is missing certain pages covering two backpay quarters. Keough testified the questionnaire was only first issued around March 2013 to Smith. Keough testified she resent questionnaires to discriminatees when there was something unclear or unusual about their response, but she was never asked to explain why the two quarters were missing from Smith's questionnaire, or why the Region failed to follow up pertaining to the apparently missing pages until shortly before the date this proceeding opened. Smith, who filed a detailed response on the remainder of the questionnaire for each quarter listing nine items per quarter, could only state he could not recall whether he originally tendered information relating to the missing quarters when he filed his questionnaire with the Region. I have concluded that since this is a backpay proceeding and that ambiguities are to be construed in favor of the discriminatee, despite the unusual circumstances here, I assign fault to the Region's compliance efforts and not that of Smith. First, although Keough became compliance officer in 2011, the questionnaires were not sent to the discriminatees until 2013, that is after their backpay period had ended, creating difficulties in recall and in their record keeping. With respect to Smith, while I have concluded that no pages from his questionnaire were purposefully withheld by him, or intentionally lost by the Region, it appears that from Keough's testimony when they were found to be missing Smith should have been contacted earlier on to have the requested information resubmitted. Since, I lay this at the hands of the Region, which Keough testified was handling another large case during her early period on the job, I cannot place the blame on Smith. Moreover, the job list Smith submitted covering some of the gaps in the missing questionnaire pages, has been further supplemented by Smith's credible testimony concerning his job search. I have therefore credited the contents of his supplemental list, which for the most part is consistent with the content of his questionnaire which also contains the specific address of the employers listed. I also find Smith's seeking some jobs that Respondent takes issue with came as a result of his willingness to accept any work due to the lack of his success in finding a job.

I therefore find that Smith, who was in his 60's at the time of the strike, who had been working for Respondent for around 16 years as a warehouse employee when the strike began,

and who only had a high school equivalency degree made a reasonable job search during the backpay period given his age, education, and skill level. I find that he is entitled to full backpay as set forth in the amended compliance specification, and as designated in GC Exh. 3.

h. Glenn Smith

Smith was born in 1955, making him in his mid-50's at the time of the strike. Smith's education level was the 12th grade. During his backpay period, which ran from July 6, 2010 to November 12, 2012, Smith lived in Capitol Heights, Maryland. He collected unemployment benefits from July 3, 2010 to December 31, 2011. At the time of the hearing, Smith worked for Respondent in its warehouse. Smith has been an employee of Respondent since 1996 and began working as a warehouse employee in February 2004. Smith testified that as a warehouseman at Respondent, his duties include checking in and stocking merchandise, driving a fork lift, and performing similar work. Prior to working in Respondent's warehouse, Smith worked for Respondent in manufacturing where he filled some of the liquid product in bottles and labeled the product. Prior to working for Respondent, Smith worked at Sears from 1983 to 1996, where he held a position of store engineer, during which Smith rerouted wires, drilled holes, changed bulbs, and made sure the boiler room was working properly. Smith learned the job at Sears through on-the-job training. Prior to 1983, Smith worked as a clerk at F.L. Watkins, a hardware store, where Smith ran the cash register and waited on customers. Smith learned this job through on-the-job training.

Smith testified he was told by the state unemployment agency that he had to search for a job to receive benefits. He could not recall if he was told how many jobs he had to apply to. He testified he had to call in every other Friday to telecert that he was looking for employment. He testified unemployment did not ask anything else specific by phone. Smith testified unemployment gave him a book to record his job search and he filled out the book, but no longer had it in his possession at the time of the hearing. Smith testified he wrote down the jobs he applied to as part of his records for unemployment. Smith testified his unemployment ended because his 86 weeks of benefits expired.

Smith identified the questionnaire he submitted to the Regional office. He testified he sent it back in one mailing. Smith testified he checked the unavailable to work strike duty box in the questionnaire due to a misunderstanding, and that by checking the box he was not stating he was unavailable for work. I credit Smith's explanation because although he checked the box he attached detailed sheets throughout the questionnaire listing employers he had contacted seeking work.

Smith testified some of the jobs he applied to were retail jobs. He testified that, as his questionnaire shows, on October 2, 2012, he went to the Arundel Mills with an all day walk looking for work. He testified he inquired about a job at a casino that was being built there, and in his view that would not have been a retail position. Smith testified there were no other places at Arundel Mills that were not retail. Smith was questioned about some of the other jobs he applied to as listed on his questionnaire. Smith listed Ron the Plumber. Smith testified he inquired about this job with a friend who had worked with Smith at Sears. Smith testified he is not a plumber but to be a plumber's helper he did not need a lot of experience. Smith also applied with TruGreen, which he testified was a chemical company laying fertilizer on grass. Smith's job search included, KFC and Rite Aid. He testified at the latter he was applying for any job, nothing specific. He testified to the same concerning his application for Walgreens. Smith submitted an application for Radio Shack. Smith testified that, during his backpay period, he received one interview for a liquor store restaurant establishment, but he did not get the job.

For the period July 1 through September 30, 2010, concerning the jobs listed on his questionnaire, Smith testified that Capital Brick was the only one listed he thought was a warehouse job. He testified he submitted an application there. Smith also applied to Marshalls during this period, which he assumed was a retail establishment. He testified to his recollection, he was applying for a stockroom or sales job there.

The job listing page was missing for the January 1 through March 31, 2011, quarter in Smith's questionnaire. However, Smith was shown the compliance officer's summary of the job's he applied to during that quarter and credibly confirmed that he applied to or inquired about the jobs listed in the summary. I therefore conclude that he submitted the job listing page for that quarter to the Region with his original questionnaire and it was somehow misplaced.[21] More specifically, Smith testified he submitted applications to Pier One Imports, Big Lots, K-Mart, Wendy's, CVS, and Sherwin Williams, and that he submitted on line applications to Home Depot and Wal-Mart, and he made an inquiry with Macy's but they were not receiving applications. Smith testified that none of the jobs he applied to in that quarter were warehouse jobs. He testified he thought K-Mart, Macy's and Wal-Mart were retail establishments. Smith testified he had never worked retail before this period. Smith testified one of the jobs listed, Wendy's, was in the food service industry, and he had never previously worked for a food service employer. Smith testified, "I would have tried Wendy's if I could have got a job there. I mean, you know, I was putting applications in, you know."

Smith listed nine employers on his questionnaire for the period April 1 through June 30, 2011. He testified none of the listed jobs were warehouse jobs. Smith testified Sears and Dollar Tree were retail establishments. Smith testified Sears is a relatively large store, so he was hoping to get something there. Smith testified he applied at Ross hoping to get a job in the stockroom or sales floor. Smith testified that "Some of these I'm looking at a little different than others. I'm not going in there with one specific intention to go, to work someplace." Smith testified he did not see any of the jobs listed in advance advertising for employees, and he did not have any reason to believe the places were hiring before he visited them. Smith testified he just drove to the locations.

For the period July 1 through September 30, 2011, Smith listed nine jobs. He testified that Bob Hall's was the only warehouse listed. Smith testified he did not see any retail jobs on the list from his definition of retail. However, Smith testified he was applying for a sales job at Dollar General. Smith testified that on the list Rips was a restaurant, and KFC was food service. He testified he was applying for a sales job at Advance Auto and Staples. He did not know what those jobs were paying. Smith testified he asked about Bob Hall's wages, which he thought was a union job, and they were paying around $13 or $14. At the time of his testimony, Smith was making $19.27 an hour at Respondent. Smith testified he did not see any advertisements that any of the nine stores were hiring before visiting them.

For the period, October 1 through December 30, 2011, Smith listed nine jobs. He testified Southern States sells things for the outdoors such as mulch, and yard ornaments. He testified he applied there to probably to work in their small warehouse. Smith testified he did not consider any of the nine employers to be warehouses with the

[21] Similarly, Smith's questionnaire was missing pages for the quarter October 1 to December 31, 2010. However, the compliance officer's summary of Smith's job search contained the names, date of contact, and address for nine employers Smith had contacted during this period.

possible exception of Southern States. Smith testified he saw a hiring advertisement for Wawa on their front door, and he thought it was possible he believed Southern States was hiring before he inquired, but those were the only two of the nine listed that he thought were hiring before he inquired. Smith testified Walgreens and Goodyear Tires, among his list, were around 30 miles from his home and that he applied to each in person. Smith testified he submitted a paper application to Walgreens but Goodyear was not hiring for any job he was qualified for. Included in the list, were Davidsonville Country Market, High's Store, and Ace Hardware which were about 15 miles from Smith's home. Smith testified he applied to each in person on different days although they were all located in Davidsonville.

For the period January 1 through March 31, 2012, Smith listed nine employers on his questionnaire. He testified that, at the time, the only one he heard was hiring before he contacted them was Nordstrom's, and he was seeking a warehouse job there. Smith named Thomas Somerville Company as another employer on the list where he was seeking a warehouse job. Smith applied to Goodyear during this quarter and he had previously applied to Goodyear at another location. Smith testified he applied to Goodyear during this quarter trying to get a job on the sales floor. Smith explained, "when you're unemployed you're willing to work anywhere. You'll just go to places and put applications in and inquire when you're unemployed. It's compounded by necessity. You're just going to do it." He testified the procedure for his job search during this quarter was to go into a place, ask if they were hiring, and submit an application if they were hiring. For the period April 1 through June 30, 2012, Smith listed nine employers on the questionnaire. He testified out of the nine that Long Fence and Marlo Furniture were warehouse jobs. Smith testified he submitted an application to Marlo.

For the quarter July 1 through September 30, 2012, Smith listed nine employers. Smith testified that Marshalls was a stocking job, that Verizon might have been a warehouse job. For the quarter, October 1 through December 31, 2012, Smith listed four employers and an all day walk at the Arundel Mills Mall in search of a job. Smith testified that one of the employer's listed had a small warehouse. He testified that the day he was at the mall he entered two or three employers seeking employment, and also inquired about employment with a casino that was being built.

Smith testified he worked at Wal-Mart for 8 and ½ months during his backpay period. Smith worked for Wal-Mart from February 11 to November 2, 2012. Smith testified he worked in receiving in the stockroom at Wal-Mart. Smith testified the reasons he did not list Wal-Mart as an employer on his questionnaire was because it was not an ideal job there, and he continued to look for work. Smith testified he was working full-time at Wal-Mart earning $8.40 an hour. He testified he got the job at Wal-Mart after his unemployment ended.

Respondent argues that the locations Smith submitted to the Region primarily list retail establishments and restaurants in different shopping centers. Respondent asserts he admitted that he only applied to six warehouses during the backpay period. Respondent contends Smith's employment at Wal-Mart after his unemployment lapsed does not legitimize what it contends to be his deficient job search as he needed a job when his benefits lapsed.

I do not find Respondent's arguments persuasive. Smith was in his mid-50's at the time of the strike, had a high school level education, and have been working for Respondent for around 16 years before the strike began, splitting his time in manufacturing where he labeled product and filled bottles with liquids, and then he moved to Respondent's warehouse where he stocked items and operated a forklift. Smith's work at Respondent did not depict someone with a high skill level. There was also no evidence that Smith had a high skill level in operating a

computer, although he testified he applied to a couple of jobs on line. Thus, his seeking employment by going door to door, while criticized by Respondent, was commensurate with his demonstrated education and skill levels, and I have concluded the detail he recorded his search along with his recollection and candor show his search was earnest and made in good faith.

Moreover, while Smith described such establishments as Sears as retail when questioned by Respondent, he had a prior history of working at Sears performing maintenance work. He testified he applied to warehouses, scattered through his search, and some of the larger described "retail" establishments had non-sales functions such as working in their stock rooms. In fact, Smith obtained such a job at Wal-Mart toward the end of his backpay period. Respondent criticizes this job stating he only found it when his unemployment benefits ended. Yet, if Smith had the ability to find a better job when his benefits ran out he surely would have because he credibly testified he continued his job search while working at Wal-Mart. Moreover, Smith's working at Wal-Mart when his unemployment benefits ran out serves to confirm the bonafides of his job search when he applied to similar venues when he was receiving benefits. Finally, while Smith testified he had not previously performed retail work, this perception was not correct as he had previously worked at a clerk in a hardware store, where he ran a cash register and waited on customers. So, I find Smith's job search was reasonable, made in good faith, and that the establishments he applied to or to where he sought employment were commensurate with his education, and prior experience. I also note while Smith was earning a higher wage rate at Respondent than the job he found at Wal-Mart, this was not unexpected since he had worked for Respondent for 16 years, and in view of his skill level finding a job with the same pay when he first started out at a new employer was an unreasonable expectation. Respondent, by it argument, is trying to take advantage of the loyalty Smith displayed to Respondent as a long term employee. Smith's loss of income can be directly attributed to Respondent's unfair labor practices, not to Smith's search. Accordingly, I find he is entitled to the backpay set forth in the compliance specification, as amended, and recorded in GC Exh. 3.

(i.) Michael Renteria

Renteria was born in 1961, making him in his late 40's early 50's during the backpay period. Renteria completed the eleventh grade and obtained a GED. He then attended a 14 month vocational school for small engine repair from which he received a certificate. Renteria's resume attached to his application for employment at Respondent showed he had previously worked at such places as Sears repairing lawn and riding mowers and other small engine equipment; that he had worked at Home Depot performing sales and customer service in the lawn and garden department, and he performed some off site engine repairs there.

Renteria was working for Respondent at the time of his testimony and he has been a repair shop technician there since about 1999. Renteria's backpay period ran from July 6, 2010 to November 12, 2012. He collected unemployment benefits from July 3, 2010 until December 31, 2011. Renteria testified that beginning in July 2010, he was living in Upper Marlboro, but he also spent a lot of time in Chesapeake Beach with his girlfriend. Renteria testified his address was in Upper Marlboro, but he primarily stayed in Chesapeake Beach. Renteria moved to College Park, Maryland in October 2010. In October or November 2011, he moved to Arnold, Maryland where he continued to live until the time of his testimony. Renteria testified that from April 2010 to March 2011, he did not have a driver's license, and that he got his license back in the spring of 2011.

Renteria testified that while he was on strike, in order to receive unemployment, he had to report to unemployment that he was applying for work, but not where he was applying.

Renteria testified that he received a packet from unemployment which told him to keep records of the places he applied. Renteria testified he kept those records by writing it down. He testified he owned a computer but at the time his printer was not working. He testified he kept handwritten notes for the jobs he applied to on the internet.

Renteria testified he received a questionnaire from the NLRB sometime in 2013. For the period July 2010 through September 30, 2010, the first employer Renteria listed in his questionnaire was in July 2010 for Lanham Cycle and Turf located in Upper Marlboro. Of the eight places Renteria listed in this quarter, six were in Upper Marlboro. Renteria testified that not all of the places he inquired with for employment were listed on the Region's questionnaire. He testified when he received the questionnaire from the Region he was pressed for time for its return, and he could not recall everything from two or three years earlier. Renteria testified he had written down most of the items from his search, and he placed the employers on the questionnaire that he had kept a written record of. Renteria testified he was writing down places he contacted in 2012, but he could not locate them all. He testified that "after unemployment ran out, I had no real reason to keep records." He credibly testified no one told him he might need the records some day, and "I was sure I wouldn't need them."

Renteria testified that as far as he was aware the Union did not operate a hiring all. He testified the Union does find people jobs. Renteria testified Webber suggested that he contact S. Freedman and Sons, and Ferguson Supply. Renteria testified he contacted those places early in the strike. Renteria testified he did not record S. Freedman in the questionnaire because he was pressed for time as there was a deadline to return the questionnaire. Renteria also testified that he applied to S. Freedman between April and July 2010, prior to his filing for unemployment and he did not document things at that time. He testified he applied for a repair shop technician job at S. Freedman, and he knew the person running the operation there. Renteria testified he was assured the person would get back to him if they were hiring. Renteria testified he also talked to that individual on a weekly basis during the backpay period. Renteria testified he applied to Ferguson through a temp company called Crosby Temp Services. Renteria testified he did not record this on his questionnaire. Renteria testified he applied to Ferguson in 2011 while he was living in College Park.

Renteria testified that for the period October 1 to December 31, 2010, most of the eight places listed in the questionnaire were in College Park, Maryland. One of the places Renteria applied to during this period was AMF Bowling where he was applying as a pin setter mechanic. He also applied to The Bamboo Eatery, where he applied to be a cook. Renteria testified he had a friend who was a manager there. Renteria also applied to Mom's Organic Market where he applied for whatever was available. Renteria did not know whether these places were hiring, but walked in and asked. He testified he was told at Mom's Organic Market to submit an application on line, which he did. Renteria testified he did not submit an application to the Bamboo Eatery because they said they were not hiring. Renteria also, during this quarter, applied to Orndorff Spade Roofing, which is a roofing contractor. He testified they did not have an opening, but he filled out an application there.

During the quarter January 1 through March 31, 2011, Renteria listed nine employers on the questionnaire. The first was Beltway Plaza Shell where Renteria testified he was applying to work as a mechanic. He testified he is not an ASE certified mechanic, but that he had worked on cars his whole life. Renteria testified he never worked on cars at Respondent, but prior to Respondent he had worked at Taylor Rental as a mechanic and that he worked there on cars and trucks as he worked on their fleet vehicles, as well as on compressors, generators, tampers, backhoes, and Bobcats. Renteria testified he was there for a little over a year.

Renteria applied to CBW Furniture in Laurel, Maryland during this period. In February 2011, Renteria applied online to Home Depot in Silver Spring. He testified he did not know if they were hiring there, but he planned to travel there by bus if hired. Renteria testified he had business cards at the time and he left Advance and Precision Small Engine a business card during this period. Renteria listed Comfort Inn during this period as an employer he contacted. He testified he obtained an application there, but he did not know if they were actually hiring. Renteria explained, "I just cold knocked. I was desperate. I needed a job. I would just go places in my daily travels and see if they were hiring, ask around, go online, read the paper."

During the quarter April 1 through June 30, 2011, Renteria listed such places as Lindsay Food, testifying he had never previously worked in a food store. He also listed the Tropical Lagoon stating it was an aquarium and a friend of his was the owner. Renteria had previously worked at an aquarium in 1988. During this quarter, Renteria listed Jungs Auto Service where he testified he was applying to be an auto mechanic. Renteria also listed Rising Sun Motors, Giant Foods and Beltway Hardware. He testified he did not know if the latter two places were hiring in advance of his inquiry. He testified based on his inquiry Beltway Hardware was not hiring, and that he did not receive an application there. Renteria listed nine employers contacted in this section of his questionnaire, including three for June 2011. In a subsequent section of his questionnaire he listed two additional employers that he contacted in June 2011, they were Maryland Tractor and E & M Machinery.

For the quarter July 1, 2011 through September 30, 2011, Renteria applied for work at Noodles and Company and he testified he was looking for a job as a cook, a dishwasher, or anything. He testified, "Things were getting tough, yeah." He applied to New York Deli to work as a cook, to A-1 Pawn Shop to work in a pawn shop. He applied to a campground, where he was seeking maintenance or grounds keeping work. When asked if he had ever worked for a campground, Renteria replied, "Of course not. But I was willing to work anywhere at that point." Renteria testified he was looking for jobs around where he lived because "I was short on money and that's why my -- I was coming back to my area because I didn't have a lot of money for gas to go look for jobs." He testified at Hard Times Café he was applying to be a cook, a bartender, or anything. He admitted to having no bartending experience. Renteria testified he filled out an application at Hard Times Café. Renteria listed five employers for this quarter.

During the quarter October 1 through December 31, 2011, Renteria listed eight places where he applied. The first three places listed were Severn Lawn and Power, 84 Lumber, and the Bike Doctor. The fourth place was Arnold Farms, which Renteria testified was a nursery, and involved landscaping materials. Renteria testified he was looking to sell grounds keeping material. He testified he had experience selling grounds keeping material from when he worked at Home Depot. The next section in Renteria's questionnaire showed employer contacts from January through April 2012. Renteria listed nine contacts during that period, the last of which was Jack's Lawn Mower Repair. He testified he called and they said they were not hiring, at which point he did not ask to be sent an application. Renteria listed Gary's Garden which he testified was another landscaping company. Harbor Freight was listed, which Renteria testified sold power tools and hand tools. Tractor Supply sold outdoor goods. Renteria testified he was applying to be a mechanic there as he thought they fix tractors.

For the quarter on the questionnaire marked April 1 through June 30, 2012, Renteria listed contacts for May 2012 and June 2011, of which he listed two for each month. The second item listed is Ferndale Nursery, which Renteria at first testified was a garden center. However, upon having his memory refreshed showing the employer was a daycare center, Renteria

testified, “I think I called them assuming that this was a, you know, a nursery.” He testified he thought when he called they told him it was a daycare center, and he did not pursue it.

For the quarter July the 1 through September 30, 2012, Renteria listed four places on his questionnaire. One of the listings was Fishpaws Market. Renteria testified he was applying to do anything there in that it is a liquor store/deli located near his home. Renteria testified that during his inquiry they did not offer an application and he did not ask for one. For the quarter, October through December 31, 2012, Renteria only listed one employer and the contact was in October 2012. Renteria wrote in that section of the questionnaire “went back to work 11-2012,” and “Some job contacts done by internet and some by person to person.”

In his questionnaire for the period July 1 to September 30, 2010, Renteria identified two employers that he believed performed mechanic work, which he defined as his field which he stated would be mainly small and medium sized engines. The two employers listed were Lanham Cycle and Turf and Marlboro Mower and they worked on small engines. For the period October 1 through December 31, 2010, Renteria identified AMF Bowling, C & D Auto Service, and Orndorff Spade Roofing as falling into the mechanic work category. He testified the roofing company worked on pumps and things of that nature, and the auto service worked on cars. For the period January 1 through March 31, 2011, Renteria testified Precision Small Engines performed mechanic work. For the period April 1 through June 30, 2011, Renteria identified three employers on his questionnaire which he believed performed mechanic work, they were Jungs Auto Service, Rising Sun Motors, and B. P. For the period October 1 through December 31, 2011, Renteria identified two employers that he believed performed mechanic work, they were Bike Doctor and Severna Lawn and Power. For the period January 1 through April 2012, Renteria identified three companies that he believed performed mechanic work, they were Bay Area Tire, Tractor Supply, and Jack's Lawn Mower. He testified he thought the latter two worked on any type of lawn and garden tractor. He testified that each also could have worked on regular lawn mowers. Other entries in his questionnaire that he thought performed mechanic work were Sears, Maryland Tractor, and E & M Machinery.

Renteria testified he read the Washington Post employment section frequently in July 2010 as they would share it on the picket line. He testified after July, he did not read the Post as much, but reviewed the help wanted ads on Craig’s list on line. He testified he continued to review the Post on an occasional basis estimating it was 5 to 10 times a month. Renteria testified he probably visited the employment section on Craig’s list on a daily basis in July 2010 and through the remainder of his backpay period. He testified he sent resumes to employers he found on Craig’s list. Renteria testified, while on Craig’s list, he decided which jobs to apply to based on the job description. He testified he was looking for work as a mechanic. He testified that the applied to positions that he did not list on his questionnaire. He testified he went on a interviews, that he did not list on the questionnaire because he was pressed for time in preparing the questionnaire. Renteria testified he applied to a vacuum cleaner place in Glen Burnie, which he thought he would be repairing them from the Craig’s list ad, but when he arrived he learned it was door to door sales. Renteria testified he went on that interview in February or March 2012. Renteria testified, “I've applied quite a few places on Craig’s list.” Renteria testified he also went on an interview around the fall of 2011 in Glendale, Maryland to a core hole cutting place where he interviewed to be a mechanic. Renteria then testified, “I've been to quite a few interviews.” He testified that he went on an interview at a bowling alley in Gaithersburg, when he was living in College Park for a pin setter mechanic job. Renteria testified he also had applied for that position for a bowling alley in College Park. Renteria estimated that he went on five or six interviews, but he could not describe all of them.

Renteria was in his early 50's throughout most of the back pay period. He had a high school education which he completed by way of a GED exam. He had a 14 month tech certificate in small engine repair, a service he provided for Respondent for about 10 years prior to going on strike. In addition, to his small engine repair background, Renteria had, from employment prior to Respondent, a background as a car and truck mechanic, and retail experience in sales and service of landscaping equipment at Home Depot, and experience in working for an aquarium. Renteria's job search consisted of following up on suggestions from his union representative, reading and responding to ads in the Washington Post, and to ads on line from Craig's list, which he credibly testified he consulted on a daily basis. He also, as finances for gas would permit, drove directly to potential employers and inquired within as to whether they were hiring, for those that were or otherwise indicated a willingness to accept an application he submitted one.

Respondent argues that Renteria's job search included less than one technical job a month. However, Renteria identified 17 jobs listed on his questionnaire that he defined as involving mechanic work, and although he had a certificate in small engine repair, he testified in his prior job he worked as a mechanic for automobiles and trucks, and he included such places for those requiring mechanic work in his computations. He also described additional jobs that were not listed in his questionnaire for which he applied and for some of which he interviewed for which his mechanical skills and background were appropriate. Renteria also had some retail skills having worked at the lawn and garden department at Home Depot, and having previously worked at an aquarium for which he applied for work during his backpay period. Given his skills, limited resources, age, and background, I find that Renteria's search for work was more than reasonable. I do not find that he mistakenly applied to a daycare center which had the title of nursery undermines the bonafides of his search as Respondent contends. Rather, Renteria had a background in lawn and garden care from his experience at Home Depot and his applying to a day care center thinking that it was a lawn and garden care nursery underscores the thorough nature of his search.

Respondent also argues Renteria's failure to submit an application to every place where he inquired about employment demonstrates that his job search lacked sincerity. First, he had to travel to a lot of these places to apply which demonstrates effort, for those that stated they were hiring or allowed him to submit an application he did. For those that stated they were not hiring he did not. That approach was eminently reasonable as it is standard Board law that someone is not required to engage in a futile act. Finally, that Renteria failed to document his questionnaire as well in beginning in the second quarter of 2012 does not in my view undermine the validity of his search. Renteria's unemployment ended at the end of 2011, and he credibly testified no one informed him that he had to maintain job search records thereafter, and he did not keep possession of his notes of that search. Having not received the Region's questionnaire until the earliest, as per the testimony of the compliance officer, until the spring of 2013, Renteria had no reason to maintain job search records in 2012 after the fact. Moreover, he applied to S. Freedman and Sons earlier on during the strike and credibly testified he kept contact with their small engine department on a weekly basis throughout the backpay period, that he continued to follow the want ads in the Washington Post, and in particular on Craig's list on a daily basis throughout the backpay period, and he continued to respond to those ads. Based on Renteria's credited testimony I have no reason to conclude he lessoned his job search in 2012, particularly when his unemployment benefits had expired. I therefore conclude his job search was substantial and reasonable throughout the backpay period and he is entitled to backpay and benefits as defined in the compliance specification, as amended, as set forth in GC Exh. 3.

j. Derrall Bridges

Bridges, at the time of his testimony, worked for another employer as a warehouseman. Bridges began working for Respondent in 2004. He was a driver the whole time he was at Respondent. Bridges resigned from Respondent in December 2011, prior to his being recalled to work. He testified he resigned in order to withdraw his 401(k) contribution because he was a single parent and had to pay bills. Bridges worked as a driver prior to working for Respondent. Bridges backpay period ran from July 6, 2010 to December 12, 2011. Bridges collected unemployment benefits from July 3, 2010 to January 14, 2012. Bridges had a class B CDL license throughout his backpay period, which he testified also served as a standard issue driver's license. Bridges did not have a car during his backpay period.

Bridges was born in 1971, graduated high school, and attended some classes at a community college but has not received an associate's degree. Bridges lived in Landover, Maryland during his backpay period. Bridges left his apartment and moved in with his mother around February 2012, and at that time he obtained a P.O. box. Bridges submitted three questionnaires to the Region. Bridge's recall as to the circumstances of how, when and why he received each of the questionnaires was poor, as was his recall as to the order of their receipt. While he testified he may have received one of the questionnaires in 2010, I do not credit this time estimate. Rather, I find that as Keough testified the questionnaires were not mailed until the spring of 2013.

As to the questionnaire labeled R. Exh. 60, Bridges checked the strike duty box on this questionnaire. On this questionnaire Bridges wrote strike line as his employer, and he left every page calling for a list of employer contacts, during his backpay period, blank. Bridges submitted another questionnaire to the Region entered into evidence as R. Exh. 61, where on the first page of quarter July 1 through September 30, 2010, he stated he was unable to work from April 26 to December 12, 2011 checking the box strike duty. In this questionnaire, Bridges also failed to list any employers contacted for his job search during his backpay period.

Bridges identified a third NLRB questionnaire which was entered in evidence as R. Exh. 62. In this questionnaire, for the quarter July 1 through September 30, 2010, he wrote "searching for work and" followed by an arrow to the strike duty box. Bridges testified that for the first month or so of the strike they were on the strike line, and he described this period as April to May, 2010. He testified after that they, including him, started looking for work. He testified that he checked the strike duty box because it was his obligation to participate in the strike, but "as the months rolled on, I seek work. I try to find work." Bridges explained he did not put searching for work on the first two questionnaires because "I didn't understand these documents. I was confused. I mean when it came to me it was in the past tense, and I just didn't know what to put down because just like you see, you see three different documents. And I guarantee you if I had another one, I probably would have wrote something else different on it." Unlike the other two questionnaires, in R. Exh. 62, Bridges listed names, dates, and addresses of employers as part of his job search.

Bridges testified that he received unemployment benefits during the backpay period, and he had to inform the unemployment agency that he was looking for work. He testified he had to list the places he looked for work to unemployment on questionnaires they provided him. Bridges testified he received a bi-weekly check from unemployment, and that every 2 weeks unemployment sent him a questionnaire concerning his job search, which he had to fill out and send back in. Bridges testified he started receiving these questionnaires from unemployment about 6 months to a year after he went on strike. Bridges testified he had to start filling in the

unemployment questionnaires after federal unemployment funds kicked in. Bridges testified that to his recollection the extension kicked in because he was on unemployment for so long, "That's when we started having to do continuous job searches." He testified that before that time, he did not have to report his job searches to unemployment, "But I was looking for work." When asked why he did not list those same employers on the NLRB questionnaires he testified the unemployment questionnaires came way before the NLRB questionnaires did so the time frame was different.

For the quarter July 1 through September 30, 2010, Bridges listed five employer contacts in R. Exh. 62.[22] He testified he made on line applications for all five listed jobs. Bridges testified the five places listed were some of the places where he sought work, "but there was plenty of other places. I mean, I actually looked for a lot of work." Bridges explained that he applied to a lot of other places but he did not list them on the Region's questionnaire because he might not have been home when he applied. Bridges testified the employers listed on the questionnaire were, "what I know I did on the computer." Bridges testified that four of the five positions he listed on his questionnaire for this quarter were driver positions, and the fifth was for working at a warehouse.

For the quarter October 1 through December 31, 2010, Bridges again listed five employer contacts. Bridges testified these were not the only jobs he applied to during that quarter. Bridges testified he knew he submitted an application on line for all of the jobs he had listed in the questionnaire for this quarter. He had good recall as to the specifics of several of his contacts listed for this quarter. For the quarter January 1 through March 31, 2011, Bridges listed four places on the Region's questionnaire. Two of the jobs listed in this quarter on the questionnaire contained February and March 2010 dates for the dates of inquiry. Bridges could not recall whether he applied for those jobs in 2010 or 2011. For April 1 through June 30, 2011, Bridges listed four employers. He testified he went to three of the places and one he applied on line.

For the period July 1 through September 30, 2011, on the Region's questionnaire Bridges listed five employers in his search for work. One of the employers listed was Capstone Logistics, which Bridges thought was a trucking company. Bridges thought the jobs listed were sent to him from a website called Logistics.com. He named two other websites Monster or Jobs.com where he testified they sent him by email daily and weekly truck driver and warehouse jobs. He testified he had filled out a profile sheet of what type of jobs he was interested in within a certain mile radius. Bridges testified he received emails that listed "a bunch of different jobs" that he had to siphon through for any that were applicable to him. On his questionnaire for the period of October 1 through December 31, 2011, Bridges listed five employers. Bridge's testified he was available to work throughout his whole backpay period.

Bridges testified he applied to over 70 jobs on government sites, but he could not get them to print out. Bridges testified that he used the Prince George's County government jobs and parking planning websites. He testified he used a site a lot located at governmentjobs.com. Bridges testified he would go on the Prince Georges County government site and search for truck driving jobs and maintenance jobs. Bridges testified the government advertised jobs, but

[22] As set forth above, Bridges only listed employer contacts on one of the three questionnaires tendered to the Regional office, and it is those employer references that are being discussed here and below. Bridges testified he has moved and a lot of paper work was shuffled in further explanation of why he provided this information on this questionnaire and not on the others.

he just had an interview for a job he applied to 2 years earlier indicating how slow they were to respond.

Bridges testified he used the PG County Park and Planning website every month of his backpay period and he would visit the site around once a week. Bridges testified he had his resume and application on two sites the PG County site and the park and planning site. Bridges testified he posted his resume in park and planning in July 2010. Bridges estimated he submitted around four applications a month through this process in the park and planning site during his backpay period stating, "Because I know to this day now I had like 70 of them in there." Bridges testified governmentjobs.com is the PG County site. He testified checked this site at least once a week during the back pay period. Bridges posted a resume on this site in July 2010. He estimated that he applied for two jobs a month on this site. Bridges testified he took tests for a couple of jobs he applied to on this site. He testified he took an operator test for dispatching 911 calls. He thought he took the test in November 2011, but he did not qualify for the job.

Bridges testified logistics.com is a website for drivers. It lists any type of driver job, Class A, B, C, flatbed, and the area the jobs are located. Bridges testified he received emails once or twice a week from this site. He testified, "I could apply to a couple of them, but most of those are Class A and I didn't have a Class A. I had a Class B." Bridges testified he used Monster.com. during the backpay period. He estimated he went on Monster around once a week. He testified he started using the site in July 2010. He testified he applied to two or three jobs a month during the backpay period through the use of the Monster site. Bridges also used a site called Jobs.com during the backpay period. Bridges explained that when he testified he applied to two or three jobs a month that was from the use of multiple websites. Bridges testified that during his backpay period he reviewed a magazine called the Pennysaver, which contained help wanted ads once a week. He testified he reviewed the Washington Post job section at least twice a week.

I find that the General Counsel has established that Bridges is entitled to the backpay set forth in the amended compliance specification as set forth in GC Exh. 3. While he filled out three of the Region's questionnaires, and two were blank concerning a list of employers, I have credited Bridges testimony that he moved after the Region issued the questionnaire, and that his having received the questionnaire over a year after his backpay period ended confused him in terms of how to respond to the questions it posed. Regardless, he testified in a credible fashion concerning the questionnaire where he listed jobs and I find that he actually applied or otherwise contacted the jobs listed. Bridges also credibly testified that he did not list all of the jobs he applied to on the questionnaire, due to the nature of his application process, ability to print certain online applications, and due to his record keeping ability in general. He credibly testified that the employer contacts he listed in the questionnaire were supplemented throughout the backpay period through a multitude of applications he had made on government and other websites, by contacts he made through newspaper classified ads, and by going door to door when he saw help wanted signs. While Respondent did not concede the adequacy of Bridges' job search at the hearing, it failed to contest Bridges' job search in its post-hearing brief. To the contrary, it relied on Bridges' job search to demonstrate there were available jobs during the backpay period, further demonstrating the thoroughness of Bridges' search.

k. Gregory Mingle

Mingle was not called to testified. Mingle's backpay period ran from July 6, 2010 through June 13, 2012. Mingle collected unemployment benefits from October 9, 2010 through

June 30, 2012. Mingle was born in 1954, making him in his late 50's during the backpay period. According to Keough's summary, Mingle obtained interim employment with the Washington Redskins from June through December 2010, and Keough also listed that Mingle had some slight earnings from the UPS during the fourth quarter of 2010. Earnings from these employers, as well as striker benefits were applied as interim earnings in calculating Mingle's backpay for the third and fourth quarters of 2010.

Keough made a summary showing the reported search for work by the discriminatees. However, she listed no employer contacts for Mingle. Keough testified there was no written record of Mingle applying for work until June 2012, when he returned to Respondent's employ. Keough testified the Region did not disqualify Mingle for backpay because he orally represented to us that he made job contacts, but he had difficulty recalling specifics, and he did not submit anything in writing to the Region. She testified he estimated making several contacts per week. Keough testified she did not recall Mingle remembered any of these contacts, and he provided nothing in writing listing them to the Region. Thus, for all four quarters in 2011 and the first two quarters in 2012, Keough admitted Mingle was not able to name one employer he contacted documenting his search for work. None of the other witnesses recollection was a poor as Keough testified Mingle portrayed his to be. Moreover, the General Counsel elected not to call him as a witnesses to at least explain the method of his purported job search, i.e., newspapers, word of mouth, door to door, internet, as had been done for other discriminatees. The only evidence the Region presented concerning Mingle's search for work in 2011 and 2012 was in essence Keough's hearsay explanation that he said he was looking for work.

Keough failed to explain why she found Mingle's undocumented search sufficient for a year and one half period, when based on similar circumstances, she disqualified Mendez for backpay for the third quarter of 2010. Concerning Mendez, Keough testified that Mendez' search for work in the third quarter of 2010 was not sufficient, according to the Board standards. She testified that he could not come up with a single contact that he made during that quarter, so the Region tolled his backpay for that quarter. While the Region tolled Mendez backpay for the third quarter of 2010, the Region's records reveal that Mendez collected unemployment from July 3, 2010 to December 31, 2011. Thus, Mendez could not name a contacted employer for the first quarter of the backpay period, during a time he was receiving unemployment and he was disqualified for that quarter, while Mingle could not name an employer for all of 2011 and the first half of 2012 and Keough testified the Region concluded he should not be disqualified.

Respondent argues in its brief that Mingle's backpay should be tolled effective January 1, 2011. I agree with Respondent's position. The General Counsel argues, citing *St. George Warehouse,* 351 NLRB 961, 964 (2007), that in certain circumstances it may not be necessary to have a discriminatee testify for them to receive backpay. There, the Board stated the usual method for the General Counsel to meet their burden concerning a discriminatee's job search is to call the discriminatee as a witness. However, in certain unusual circumstances, such as the death of the discriminatee, they may not be available to testify. The Board stated in those circumstances where the General Counsel does not produce the discriminatee, the General Counsel may satisfy his burden by providing other competent evidence as to the discriminatee's job search such as documentary evidence, or the testimony of someone familiar with the discriminatee's job search. Here, no reason was advanced in the General Counsel's brief for the General Counsel's failure to call Mingle, Mingle failed to respond to the Region's request to document his job search in that he did not return the Region's questionnaire, and the compliance officer did not witness any of Mingle's job search activities but only could relate what he vaguely reported to her.

While Mingle did collect unemployment during the quarters at issue during the backpay period, I do find this standing alone, sufficient to establish that he made a reasonable job search during 2011 and the first two quarters of 2012. In this regard, the employees who testified gave varying accounts of the unemployment procedures they followed to obtain benefits, and I was able to observe their testimony as to how they complied with those procedures and how it related to their overall job search. Here, Mingle provided no such testimony. Accordingly, I find that the General Counsel has not established that Mingle made a reasonable job search during the four quarters of 2011, and the first two quarters of 2012, and I deny him backpay during the specified time periods. I find he is owed backpay for the fourth quarter of 2010, as set forth in the amended compliance specification, as designated in GC Exh. 3.

On these findings and conclusions, and on the entire record, I issue the following recommended[23]

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, its officers, agents, successors and assigns, shall pay the claimants the amounts specified after their names below, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), minus tax withholdings required by Federal and State laws.

Erin Baker	$20,395.01
David Boone	$68,797.02
Clarence Bratcher	$67,596.11
Robert Brice	$31,909.70
Derrall Bridges	$47,519.20
Eugene Brown	$27,943.60
Lynette Burton	$60,339.20
Rawle “Ron” Daniels	$82,388.27
John Day	$2,712.00
Thomas Geris III	$4,796.39
Horace Griffin, Jr.	$51,689.42
Daniel Higgs	$7,542.50
Trevor Holder	$52,750.93
Darren Koger	$7,578.19
David Limerick	$16,925.63
Diarra Mackall	$18,102.62
Ronnie McFadden	$66,767.19
Adalberto Mendez	$55,464.06
John Merritt	$7,368.43
Gregory Mingle	$4,394.00
Alvin Phoenix	$27,223.85
William Posey	$8,922.23
Robert Redmond	$6,971.45
Michael Renteria	$77,116.00
Howard Robinson	$12,071.21
Victor Scurry	$20,601.31
Glenn Smith	$59,361.48
John Smith	$47,893.04
Brenda Taylor	$47,968.83
Justin White	$7,662.83
Daniel Wiggins	$68,744.08
Dale Windsor	$28,077.28
Total =	$1,115,593.06

Dated, Washington, D.C. Monday, June 16, 2014.

_____
Eric M. Fine
Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DAYCON PRODUCTS COMPANY, INC.

and Case Nos. 5-CA-35687
5-CA-35738
5-CA-35965
5-CA-35994

DRIVERS, CHAUFFEURS AND HELPERS
LOCAL UNION NO. 639 a/w
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Daniel M. Heltzer, Esq., and Jason N. Usher, Esq.
for the General Counsel.
Paul Rosenberg, Esq., of New York, New York, and
Erica Berencsi, Esq., of Washington, D.C.
for the Respondent.
John R. Mooney, Esq., and Lauren Powell, Esq.,
of Washington, D.C. for the Charging Party.

Table of Contents